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No. _____

In the Supreme Court of the United States

COLLEEN RENVILLE DUMARCE & PAMELA RENVILLE,
Petitioners,

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR;
DEPARTMENT OF THE INTERIOR; &
THE UNITED STATES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Whether the government acting as trustee to protect Indian lands from improvident disposition has fiduciary duties equivalent to those of other trustees as imposed by common law.

2.

Whether the consolidation of cases permits an appellate court to bind an appellee to the disposition of an appeal when the appellant failed to appeal the decision as to that appellee and failed to raise the appealed argument in that appellee's action at the district court level.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Federal Circuit.

Petitioners here and appellees below are Colleen Renville DuMarce and Pamela Renville. Appellees in the Federal Circuit whose interests are not implicated by the outcome of this proceeding and thus do not join in this petition are Harvey DuMarce, Kenneth Ervin DuMarce, and Dennis L. DuMarce, Sr.

Respondents here and appellants below are Dirk Kempthorne, named in his official capacity as Secretary of the Interior; the United States Department of the Interior; and the United States.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Colleen Renville Dumarce and Pamela Renville pray that the Supreme Court issue a writ of certiorari to review the judgment of the Federal Circuit Court of Appeals entered on May 4, 2006, which held, *inter alia*, that Respondents breached no fiduciary duty to Petitioners and thus Petitioners' claims seeking return of tribal lands unconstitutionally taken by Respondents were not equitably tolled.

OPINIONS BELOW

The panel opinion of the Federal Circuit Court of Appeals is reported at 446 F.3d 1294, and is reprinted in the Appendix to the Petition at A-2. The opinion of the Federal Circuit Court of Appeals on Petition for Rehearing *En Banc* is reported at 466 F.3d 1021, and is reprinted at A-24. The District Court's opinion is reported at 277 F. Supp. 2d 1046 and is reprinted at A-30.

JURISDICTION

The court of appeals entered its judgment on May 4, 2006, and a timely-filed petition for rehearing was denied on October 4, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Federal Rule of Civil Procedure 42(a) provides:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

STATEMENT OF THE CASE

This case presents the Court with important questions regarding the fiduciary relationship between the United States, acting as trustee of Indian lands, and the Indian beneficiaries of that trust. Specifically, these questions consider whether the fiduciary duties of the government in protecting Indian lands from improvident disposition are consistent with common law fiduciary duties, or whether a lesser duty applies.

FACTUAL BACKGROUND

Under the General Allotment Act of 1887, Congress allotted to each member of the Sisseton-Wahpeton Indian Tribe 160 acres of land. The allotted lands are held in trust by the United States to protect the Indians from improvident disposition of the land. *See Hodel v. Irving*, 481 U.S. 704, 707 (1987).

Petitioners' father, Felix Renville, Sr., died in 1986, providing in his will that his children were to inherit all of his property. Included in Felix Renville, Sr.'s estate were four parcels of familial lands, originally allotted to his ancestors, but subject to the escheat provisions of then-newly-enacted Section 5 of Public Law 98-513. That statute, addressing Indian lands on the Sisseton-Wahpeton Reservation, provided that:

> Notwithstanding any other provision of this Act, no person shall be entitled by devise or descent to take any interest, including any interest in a life estate under section 4 of this Act, less than two and one-half acres, or the equivalent thereof, in trust or restricted land within the reservation. *Any interest less than two and one-half acres of a devisee or intestate distributee of a decedent under section 3 of this Act, shall escheat to the tribe and title to such escheated interest shall be taken in the name of the United States in trust for the tribe:* Provided, that the provisions of this section shall not be applicable to the devise or descent of any interest in trust or restricted land located within a municipality.

P.L. 98-513 § 5 (hereinafter "Section 5") (emphasis added).

On May 18, 1987, this Court considered the escheat provision of a statute substantively similar to Public Law 98-513 in *Hodel v. Irving*. There, the Court held that the escheat provision, as embodied in Section 207 of the Indian Land

Consolidation Act of 1983, sanctioned unconstitutional takings.[1] 481 U.S. at 718.

Six months later, knowing that the escheat mechanism of Section 207 was unconstitutional, the United States through the Department of the Interior, *acting as trustee*, sent Petitioners a "notice" dated November 24, 1987, which informed the beneficiaries that:

> Part of decedent's land interest on the Sisseton Reservation are subject to Pub. L. 98-513, 9 Stat. 2411, entitled "An Act Pertaining to the Inheritance of Trust or Restricted Land on the Lake Traverse Indian Reservation in North and South Dakota" enacted October 19, 1984. That the Act provides, among other things, that the decedent's heirs or devisees must be enrolled members to be eligible to a life estate and the title to the land escheats (passes) to the Tribe. In addition, if the decedent's interest in a parcel of land amounts to less than 2 ½ acres, then such interest escheats to the Tribe (unless the land is located with a municipality) even though decedent's heirs are enrolled members of the tribe. . . . Therefore, as set forth above, the decedent's respective interests . . . shall escheat to the United States.

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[1] Section 207 mandated that "No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descedent [*sic*] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat." *Hodel*, 481 U.S. at 709 (citing 96 Stat. 2519). Congress amended Section 207 in 1984, allowing a landowner five years to reach the $100 earnings minimum, allowing devises of fractional interests to individuals already owning an interest in the same tract of land, and allowing Indian tribes to opt out of Section 207's requirements through adoption of their own codes governing disposition of fractional interests. The amended Section 207 was held unconstitutional in *Babbitt v. Youpee*, 519 U.S. 234 (1997).

(A-21.)

This notice from the trustee contained no mention of the fact that a statutory scheme almost identical to Public Law 98-513 had just six months earlier been found unconstitutional by this Court. (A-21.) Nor did the notice make any attempt to actually inform Petitioner beneficiaries that the trustee's legalese meant that the trustee intended to take their lands without compensation and give the land to someone else. (A-27-28.) Subsequent to this "notice," Respondents took Petitioners' lands by escheat.

PROCEEDINGS BELOW

On June 26, 2002, Petitioner Colleen Renville Dumarce filed a Complaint in federal court for the District of South Dakota, invoking federal question jurisdiction of that court under 28 U.S.C. § 1331.[2] The government moved for summary judgment, arguing that Ms. Renville DuMarce's claims were barred by the applicable statute of limitations. Renville DuMarce cross-moved for summary judgment, and argued that Respondents' breach of fiduciary duty in failing to provide adequate notice equitably tolled the statute of limitations. Assuming without deciding that the six-year statute of limitations in 28 U.S.C. § 2401 would otherwise govern the action, the district court agreed that respondents breached their fiduciary duties to Renville DuMarce and that the statute of limitations, if applicable, was equitably tolled. (A-44.) The district court held:

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[2] Renville DuMarce was joined in the action by plaintiffs Harvey DuMarce and Kenneth DuMarce. These plaintiffs' claims arose out of the escheat of an estate other than, and formed more recently than, the estate of Felix Renville. There was no question that these claims were timely, and the government has never contested the district court's holding that Section 5 of Public Law 98-513 is unconstitutional. These other plaintiffs are not parties to this action for purposes of certiorari.

> Renville DuMarce's arguments are well-taken. It does seem odd that the government, as trustee, would advance an argument requiring the trust beneficiary, a non-lawyer, to actively investigate whether she has claims against the trustee. Such a scenario would turn the trustee relationship upside-down. In addition, the court also believes that, because of the amendment of section 207, sufficient ambiguity existed regarding its application to excuse a non-lawyer trust beneficiary from steadfastly relying upon it. Finally, the court also finds that it would be inequitable to permit the government, as trustee, to enact unconstitutional statutes that directly work to the disadvantage of the trust beneficiaries, remain silent, let time pass, and then raise that passage of time as a defense to its unconstitutional behavior. This court will not condone such behavior. A trustee, especially the United States, must do more.
>
> Accordingly, Renville DuMarce will be permitted to proceed in this case. Although her claims are rather old, the court finds, as a matter of law, that the government breached a fiduciary duty owed to her by failing to inform her of her potential cause of action against the United States. Certainly, the United States knew and understood the *Irving* decision in 1987. The government's failure to inform those burdened by similar statutes should lie at its feet and not at the feet of the beneficiaries of the trust relationship.

(*Id.*)

Petitioner Pamela Renville filed a separate complaint on December 17, 2002, also stating a claim for the reopening of Felix Renville, Sr.'s estate. After the court's May 15, 2003 summary judgment ruling in her sister's case, quoted above, Pamela Renville separately moved for summary judgment in

her own case on August 12, 2003. Respondents failed to raise a statute of limitations defense in Pamela Renville's action. (Def.'s Resp. in Opp'n to Pl.'s Mot. for Summ. J., Injunctive Relief, and Final J., *Renville v. Norton*, No. CIV-02-1040 (D.S.D. 2003) (Doc. No. 21).)

On October 21, 2003, the district court entered a consolidated order in both cases, enjoining Respondents from any further use of unconstitutional Section 5, and ordering Respondents to reopen Felix Renville's estate and probate the estate "as though Section 5 . . . did not and does not exist." (A-51.) On August 4, 2004, the district court ordered that the cases be consolidated into one file. (A-60.)

On December 2, 2004, Respondents appealed, as to Renville DuMarce only, to the Court of Appeals for the Federal Circuit, seeking reversal on the sole basis that her claims were time-barred. (Br. of Appellant, *DuMarce v. Scarlett*, 446 F.3d 1294 (Fed. Cir. 2006).) Jurisdiction in that court was invoked under 28 U.S.C. § 1295(a)(2). (*Id.*)

Renville DuMarce argued that the appeal was moot and sought an advisory opinion. (Br. of Appellee, *DuMarce v. Scarlett*, 446 F.3d 1294.) The district court had ordered that Felix Renville's estate be reopened in Pamela Renville's case, as well as in Renville DuMarce's action; the government had failed to raise a statute of limitations defense in Pamela Renville's action; and the government appealed only as to Renville DuMarce, and *not* as to Pamela Renville. (*Id.*) Thus, Felix Renville, Sr.'s estate would be reopened in Pamela Renville's case regardless of the court of appeals' decision in Renville DuMarce's action, thus mooting the government's "case or controversy" with Renville DuMarce. (*Id.*)

The court of appeals adjudged Renville DuMarce's claim, and held that the *Irving* decision's impact on the legality of Respondents' taking was not a fact which

Respondents as trustees had a duty to disclose. (A-11-14.) The court held that there was no conflict of interest inherent in Respondents' enforcement of Section 5 and their fiduciary duties to petitioners, "and hence no heightened duty to inform DuMarce of anything." (A-14.) Additionally, the court in a footnote bound Pamela Renville by its judgment, stating:

> Pamela Renville's claim is time-barred as well. . . . [A]lthough the district court's decision on the government's motion for summary judgment on statute of limitations grounds was rendered prior to the consolidation of DuMarce's case and Renville's case, the decision pertains not only to DuMarce, but, following consolidation, to Renville as well. The outcome of this appeal therefore affects both DuMarce and Renville, and the appeal is not moot.

(A-3.)

Judge Lourie dissented, stating that the existence of the *Irving* decision was arguably a fact that a trustee should have told its beneficiary, and even if "not truly a 'fact,' a trustee, having a fiduciary relationship to its beneficiary, should have been expected to inform its beneficiary concerning it." (A-21.) Judge Lourie further opined that:

> The government, as trustee, had the duty of informing its beneficiary that the Supreme Court had struck down a law very similar to that which the 'trustee' was currently enforcing against the 'beneficiary' against the beneficiary's interest. Aside from being essentially within the majority's "Federal Circuit rule" requiring disclosure of facts, it represents a clear conflict of interest between the government's role as trustee for DuMarce and its role in enforcing an unconstitutional statute against her. That conflict should have heightened the government's duty to inform its beneficiary.

(A-23.)

Petitioners filed a timely petition for rehearing *en banc* on June 16, 2006. The petition was denied on October 4, 2006, this time with Circuit Judges Gajarsa and Newman dissenting from the denial of *en banc* hearing. (A-25.) The dissenters noted that that this Court's recent decision in *Jones v. Flowers*, 126 S. Ct. 1708 (2006), suggested that the notice provided by the government was constitutionally inadequate as a matter of due process, and thus *ipso facto* violated Respondents' fiduciary duty to give Petitioners adequate notice. (A-28-29.)

REASONS FOR GRANTING THE WRIT

The court of appeals' decision in this case directly conflicts with applicable precedents of this Court, which uniformly hold that the government, as trustee charged with protecting Indian lands from improvident disposition, owes a fiduciary duty to its Indian beneficiaries equivalent to the fiduciary duties required by the common law for all trust relationships.

This case has important and widespread ramifications for the nation's Indians. The court of appeals' decision signals to all Indians and tribes that they can no longer rely on the government as trustee to protect their lands; nor can they rely on the candor of the trustee to inform them when their rights to their land might be violated by the very institution charged with protecting those rights. As the district court stated below, this arrangement turns the trustee-beneficiary relationship on its head, absolving the government of the land-protecting functions the trust relationship was intended to impart, and placing the responsibility to protect Indian lands on the Indian beneficiaries themselves.

In addition, the court of appeals' decision resolved an important procedural issue contrary to the precedents of this

Court. Consolidation of claims for appeal "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 496-97 (1933) (construing the former 28 U.S.C. § 734, now amended at Fed. R. Civ. P. 42). Nevertheless, the court of appeals held that the consolidation of the claims bound Pamela Renville to the court's decision in her *sister's* case, despite the government's failure to appeal Pamela Renville's own case; and further, that consolidation even bound Pamela Renville to orders entered in her sister's case before consolidation of the claims. This procedural error calls for the Court to exercise its supervisory powers to clarify the continuing validity—or lack thereof—of *Johnson* in light of Federal Rule 42's replacement of 28 U.S.C. §734.

A. The Court Of Appeals Applied A Lower Fiduciary Duty Standard To The Government's Obligation To Protect Indian Lands That Directly Conflicts With The Standards Mandated By This Court's Prior Decisions And Violates Due Process.

This Court's jurisprudence demonstrates that the duties owed by the government to Indians, at least in protecting Indian lands, are consistent with the fiduciary duties applicable at common law to any other trustee. In *United States v. Cherokee Nation of Oklahoma*, the Court held: "It is, of course, well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity." 480 U.S. 700, 707 (1987) (citing *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942)). The government "may not 'give the tribal lands to others, or . . . appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them.'" *Id.* at 707 (citing *United States v. Creek Nation*, 295 U.S. 103, 110 (1935)). Importantly, this Court has noted that the allotment statutes promulgated under the General Allotment Act placed

allotments in trust "in order to protect the allottees from the improvident disposition of their lands." *Hodel v. Irving*, 481 U.S. 704, 707 (1987).

These fiduciary responsibilities were further defined in *Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Association*, wherein the Court stated that the fiduciary duties owed by the government to the Indians

> has been described as 'one of the primary cornerstones of Indian law' . . . and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus.

532 U.S. 1, 11 (2001) (quoting F. Cohen, Handbook of Federal Indian Law 221 (1982) and citing *United States v. Mitchell*, 463 U.S. 206, 225 (1983)). And in *United States v. White Mountain Apache Tribe* 537 U.S. 465, 476 n.3 (2003), as well as in *Mitchell*, this Court confirmed that when a statute charges the government with a fiduciary duty, or when the elements of a common law trust are present, the government-Indian relationship is subject to common law fiduciary duties, including "such care and skill as a man of ordinary prudence would exercise in dealing with his own property." *Id.* at 475 (citing *United States v. Mason*, 412 U.S. 391, 398 (1973)); *see also Mitchell*, 463 U.S. 206, 225 (1983).

Indeed, *Mitchell* noted a difference between the government's "bare trust" obligations and its common law trust obligations arising when a common law trust or statutorily-created fiduciary relationship is present. 463 U.S. at 225. The government's protection of Indian land satisfies *either* test for imposing common law fiduciary duties. First, while the trust created by the General Allotment Act imposes

few *other* fiduciary duties on the government, *Mitchell*, 463 U.S. at 224, the *very purpose* of that trust was to "prevent improvident alienation of lands." *Id.* at 217-18. Second, the obligation to protect Indian lands features all of the elements of a common law trust: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian lands). *Id.* at 225. Thus, if common law fiduciary duties may *ever* be found in the government-Indian relationship, it *must* be found in cases where the government's duty at issue involves protecting Indian land rights, as this is the government's "bottom-line" duty as noted in *Hodel*, 481 U.S. at 707, as well as in *Mitchell*. 463 U.S. at 217-18 (General Allotment Act's "trust" aspect intended to "prevent improvident alienation.")[3] In short, while the General Allotment Act does not supply authority for common law fiduciary obligations on the government's day-to-day dealings with Indians, the act nevertheless requires a fiduciary duty in matters regarding the improvident disposal of the very corpus of the trust.

This Court's precedents dictate that the General Allotment Act charges the government with one and only one simple fiduciary duty: to protect Indians from the improvident disposition of allotment land. And these precedents further mandate that in executing this fiduciary duty, the government owes Indian beneficiaries no lesser fiduciary duties than those

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[3] And indeed, the government often carries out these duties, even "acting as the Indians' personal lawyer," (*Contra* Fed. Cir. Op. at A-11), in suing as trustee on behalf of the Indians when a suit is necessary to protect the Indians' property rights. *E.g.*, *United States v. Minnesota* 270 U.S. 181, 193-194 (1926) (holding that government has standing to sue as trustee to protect Indian lands); *United States v. Gila Valley Irrigation District*, 31 F.3d 1428, 1430 (9th Cir. 1994) (government suing in its trustee capacity on behalf of Indians).

imposed by a common law trust relationship. *E.g.*, *White Mountain*, 537 U.S. at 475.[4]

Instead of holding the government trustee to its common law fiduciary obligations, the court of appeals instead invoked the "Federal Circuit test," which is predicated on a lesser duty of loyalty and candor, and allows the government, as trustee, to provide its beneficiary with only the bare minimum "facts" establishing a cause of action. Regardless of this test's legitimacy in a general sense, it is inappropriate where, as here, the situation requires the trustee to act in a full fiduciary capacity. As applied by the court of appeals, the "minimum facts" test allows the government to "protect" the allottees from the "improvident disposition" of their lands merely by mailing a notice informing the trustee of the *fact* of a disposition itself, and then leaving the Indian beneficiary to determine for himself whether that disposition might be "improvident." This "test" turns the fiduciary relationship on its head, and absolves the government of all obligations as trustee because it places the burden to protect Indian land from improvident disposition on the *Indians* themselves. Ironically, it even requires the Indians to bear this burden in protecting the land from improvident disposition through an unlawful seizure by the "trustee" itself, the United States.

But under any common law standard of fiduciary duty, a trustee is required to do more than what is required by the "minimum facts" test applied by the court of appeals. A trustee must exercise "such care and skill as a man of

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[4] Similarly, the Eighth Circuit held the government to "'the most exacting fiduciary standards'" in *Loudner v. United States*. 108 F.3d 896, 901 (8th Cir. 1997) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)). In that case, the court ruled that the government's failure to inform Indian trustees about the existence of a fund to which the trustees had a legal claim constituted a breach of fiduciary duty and therefore tolled the statute of limitations.

ordinary prudence would exercise in dealing with his own property." *White Mountain*, 537 U.S. 465, 476 (2003) (citing *United States v. Mason*, 412 U.S. 391, 398 (1973)). Here, there is little dispute that the government's bare-bones "notice" to its beneficiaries failed to meet this standard.

Indeed, the government has never disputed that under common law fiduciary duties, a trustee charged with preventing the improvident disposition of trust assets would breach his duty by allowing the trust to be raided under circumstances the trustee reasonably should have known might be unlawful. *See, e.g.*, *White Mountain*, 537 U.S. at 475 (quoting *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 572 (1985)) ("elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. 'One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets.'") Similarly, the common law trustee would breach his duty by neglecting to inform the beneficiary of the beneficiary's potential cause of action. And at minimum, the trustee would certainly have a duty to supply notice of the improvident disposition "such as one desirous of actually informing" the recipient "might reasonably adopt to accomplish it." *See Jones v. Flowers*, 126 S. Ct. at 1714; *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

Here the government, charged as trustee with preventing the improvident disposition of Petitioners' lands, failed in those duties. It took Petitioners' lands from them despite its knowledge that its actions were probably unlawful. It then provided them with "notice" of the taking that entirely failed to inform them that their trustee's actions *might* be unlawful. And finally, the notice was so replete with legalese that the trustee knew or should have known that the beneficiary would be unlikely to understand the full import of the notice—in

violation of the due process principles articulated in *Jones* and *Mullane*, and, *ipso facto*, in violation of the government's fiduciary duties.[5]

The court of appeals held that equitable tolling was not required simply because the government's actions do not constitute breaches of the bare-bones "duties" required by the special "Federal Circuit test" applicable to government-Indian cases.[6] The Federal Circuit applied its "minimum facts" test to the fiduciary relationship in this case, and ignored this Court's precedents dictating that common law fiduciary duties should apply. Even Respondents recognized and conceded these disparate and inconsistent tests. While Petitioners' cited Justice Cardozo's hornbook language on the common law duties of fiduciaries[7] as authority for the standards applicable in this case, Respondents in fact argued that "*Meinhard v. Salmon* had nothing to do with Indians or

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5 The Ninth Circuit, for example, holds that the government owes Indians a duty to comply with all general authorities not specifically protecting Indian tribes; and thus non-compliance with a legal duty constitutes a breach of fiduciary duty as well. *E.g.*, *Pit River Tribe v. United States Forest Service*, 469 F.3d 768, 788 (9th Cir 2006).

6 (A-7) (relying on *Brown v. United States*, 195 F.3d 1334 (Fed. Cir. 1999), *Menominee Tribe of Indians v. United States*, 726 F.2d 718 (Fed. Cir. 1984), and *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573 (Fed. Cir. 1988)).

7 *See Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, J.) ("Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.")

the federal government and *hence has no bearing here.*" (Opp. To Pet. For Rehearing En Banc at 5) (emphasis added).[8]

That, in a nutshell, precisely raises the question presented: Do common law fiduciary duties apply to the government's protection of Indian lands, or does a special lesser duty apply?

This Court's decisions indicate the former. The Federal Circuit Court of Appeals' "minimum facts" standard of fiduciary duty is contrary to the common law responsibilities of fiduciaries and is thus inconsistent with the prior decisions of this Court. The Court should grant certiorari to clarify its position on this important issue.

B. This Case Presents A Question Of Exceptional Importance To All Indians.

The court of appeals decision is important to all Indians, as it erodes the Indians' ability to rely at all on the duties of the government as trustee. This decision's major effect is that the government now owes its Indian beneficiaries virtually no duty at all to protect Indian lands, reflecting an effort by the government to redefine its obligations to the Indians, who themselves have been abused by the government since the early days of this Nation's history. Due to the government's abandonment of its land-protecting obligations, well-advised Indian tribes will need to retain independent counsel, trust and

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[8] The Federal Circuit never reached the issue of equitable tolling based on a breach of fiduciary duty, since it found no breach in the first instance. The propriety of equitable tolling is thus before this Court only to the extent it is a subsidiary issue within the question of the government's fiduciary duties, and only to the extent that Federal Circuit precedent does not resolve the issue. *See Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984) (cited at A-26 for the principle that equitable tolling would be proper if a breach of fiduciary duty were found).

land-management experts, and independent trustee monitors, simply to advise them on the legality, prudence, and propriety of the government's actions in regard to managing their lands. And, of course, the burden on tribes and individual Indians of limited means is even more significant, as these tribes and individuals cannot afford to employ the advisors necessary to stand in the shoes of a trustee and protect them from improvident disposition of lands. Indeed, the court of appeals decision leaves the government free to pick and choose when, if ever, it will act to protect the beneficiaries' property rights, and to leave the beneficiaries to fend for themselves without recourse in determining their rights any time the government does not desire to carry out its charge to protect these rights. A duty that exists only on the whim of the party charged creates no duty at all.

Overruling the court of appeals would clarify and restore the government's long-standing obligations to protect Indian lands from improvident disposition. This ruling would reaffirm that the government trustee does, in fact, owe Indians a common-law-quality fiduciary duty to protect the Indian lands with which it is entrusted. And it would reaffirm that Indians have a right to expect that the government trustee will, in fact, execute these duties diligently and honorably as required by this Court's decisions.

C. The Federal Circuit's Apparent Procedural Error Requires Reversal Or Clarification Of The Effect Of Consolidation Under Rule 42.

The second question presented considers whether consolidation under Federal Rule of Civil Procedure 42 may retroactively bind consolidated parties to prior orders issued in a separate case. Construing Rule 42's predecessor, 28 U.S.C. § 734, this Court held that consolidation "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 496-97 (1933)

The Federal Circuit Court of Appeals ruled to the contrary, stating that "although the district court's decision on the government's motion for summary judgment on statute of limitations grounds was rendered prior to the consolidation of [Renville] DuMarce's case and [Pamela] Renville's case, the decision pertains not only to [Renville] DuMarce, but, following consolidation, to [Pamela] Renville as well." (A-3.)

As Respondents pointed out in their Opposition to Rehearing *En Banc*, the adoption of Rule 42 has led some courts of appeals to question whether this Court's direction in *Johnson* remains good law. (*See Opp. To Pet. For Rehearing En Banc* at 10 (citing *Schnabel v. Lui*, 302 F.3d 1023, 1035 (9th Cir. 2002).)

If *Johnson* remains good law, then the court of appeals erred when it held that consolidation bound Pamela Renville to pre-consolidation orders entered in her sister's case and thus bound her to the court of appeals decision in her sister's case, *despite the Respondents' choice not to raise a statute of limitations argument in the district court, and despite their choice not to appeal Ms. Renville's case.* In that case, the

question merits this Court's exercise of supervisory powers to correct the procedural error below.

On the other hand, if *Johnson* is or might no longer be good law, then this case presents the Court with a clear opportunity to say so. If Rule 42 does indeed alter the rule in Johnson, this Court should pass upon the question and clarify the impact that consolidation under Rule 42 has in binding parties to earlier-issued orders in separate cases.

CONCLUSION

For the foregoing reasons, Petitioners Colleen Renville DuMarce and Pamela Renville pray that this Court grant their Petition for a Writ of Certiorari.

Respectfully Submitted,

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APPENDIX A

United States Court of Appeals,
Federal Circuit

No. 05-1104.

Harvey DuMarce, Kenneth Ervin Dumarce, Colleen Renville Dumarce, Pamela
Renville, and Dennis L. Dumarce, Sr., Plaintiffs-Appellees,

v.

P. Lynn Scarlett, Acting Secretary of the Interior, Department of the Interior,
and United States, Defendants-Appellants.

Decided: May 4, 2006.

Before MICHEL, *Chief Judge*, LOURIE and LINN, *Circuit Judges*.

Opinion for the court filed by *Chief Judge* MICHEL.

Dissenting opinion filed by *Circuit Judge* LOURIE.

MICHEL, *Chief Judge*.

Gale Norton, the Secretary of the Interior, the Department of the Interior, and the United States appeal the United States District Court for the District of South Dakota's grant of summary judgment based, ultimately, on its holding that plaintiff Colleen Renville DuMarce's ("DuMarce") Fifth Amendment takings claim was not time-barred. *DuMarce v. Norton*, 277 F. Supp. 2d 1046 (D.S.D. 2003) ("*DuMarce*"). On cross-motions for summary judgment, the trial court granted in part plaintiffs' motion for summary judgment, holding that the enactment of section 5 of Public Law No. 98-

513, the Sisseton-Wahpeton Sioux Act of 1984, effected a taking of Indian land without just compensation in violation of the Fifth Amendment.[1] The court denied defendants' Motion to Dismiss and Motion for Partial Summary Judgment which contended that DuMarce's takings claim was barred under the relevant statute of limitations. On appeal, the government argues that plaintiff's claim was barred by the six-year statute of limitations of 28 U.S.C. § 2401(a) because she filed her claim fourteen years after her cause of action accrued, which, the government contends, occurred when the government apprised her of all facts grounding her cause of action. Because we agree with the government that DuMarce's claim is time-barred, we reverse the trial court's grant of summary judgment to plaintiffs.[2]

I.

In 1984, Public Law No. 98-513, the Sisseton-Wahpeton Sioux Act, was enacted. Section 5 of this Act prevented the conveyance of land by members of the Sisseton-Wahpeton

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[1] While the trial court granted DuMarce's motion in part, ruling that Public Law No. 98-513 effected a taking without just compensation, it declined to grant at that time the remainder of DuMarce's motion, namely, her requests for injunctive relief, reopening of her father's estate, and just compensation.

[2] Pamela Renville's ("Renville") claim is time-barred as well. DuMarce argues that, because the government failed to raise on appeal the statute of limitations defense with respect to the complaint of Renville, DuMarce's sister, the decision below with respect to Renville will stand. Thus, DuMarce asserts that her father's estate will be reopened and redistributed regardless of the outcome of this appeal, rendering the appeal moot. But although the district court's decision on the government's motion for summary judgment on statute of limitations grounds was rendered prior to the consolidation of DuMarce's case and Renville's case, the decision pertains not only to DuMarce but, following consolidation, to Renville as well. The outcome of this appeal therefore affects both DuMarce and Renville, and the appeal is not moot.

Sioux Indian tribe by devise or by intestacy.[3] The purpose of this provision was to remedy the problem of fractionation of land. Long ago, the government had given small tracts of land that were part of larger expanses of land to individual Indians. These Indians had then passed these tracts to their heirs, either by devise or through intestacy. Over the generations, this created the phenomenon of progressive fractionation. In addition to their decreasing size, these small tracts of land each became owned by several owners, each of whom had an undivided interest in that land. In many cases, one Indian would have an undivided interest in many different small tracts of land. Moreover, one tract of land was frequently owned by an increasing number of individual Indians. The cost to the government of managing the land and title paperwork was high, due to the many small tracts and the many undivided interests in each small tract. Over time, the expense to the government became excessive. The Act reduced this problem by preventing the transfer of an interest in land that was less than two and a half acres. Instead, such land would escheat to the Tribe.

The plaintiffs in this case inherited such land from their fathers (and brother). The various plaintiffs are Pamela Renville and Colleen Renville DuMarce, whose father's (Felix Renville) estate was probated on November 24, 1987, Harvey and Kenneth DuMarce, whose father's (Gerald DuMarce) estate was probated on December 27, 1996, and Dennis DuMarce, whose brother's (Gerald DuMarce) estate was probated on December 27, 1996. At the time their estates were probated, the Department of the Interior notified the individual plaintiffs that their individual interests would

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[3] Section 5 of Public Law No. 98-513 provides in relevant part that "no person shall be entitled by devise or descent to take any interest . . . less than two and one-half acres, or the equivalent thereof, in trust or restricted land within the reservation. Any interest less than two and one-half acres of a devisee or intestate distributee of a decedent ... shall escheat to the tribe and title to such escheated interest shall be taken in the name of the United States in trust for the tribe . . . ." Pub.L. No. 98-513, § 5, 98 Stat. 2411 (1984).

escheat to the Tribe pursuant to section 5 of Public Law No. 98-513 because they totaled less than two and a half acres.[4] Fourteen and a half years after DuMarce received her November 24, 1987 Notice, Harvey, Kenneth, and Colleen Renville DuMarce filed suit (on June 26, 2002), alleging that the escheats "constitute an unconstitutional taking ... in violation of the Fifth Amendment of the United States Constitution" and requesting just compensation, among other relief. On December 17, 2002, Dennis DuMarce and Pamela Renville filed similar complaints.

Both parties in the suit brought by Harvey, Kenneth, and Colleen Renville DuMarce filed cross-motions for summary judgment. The government alleged in its partial summary judgment motion that DuMarce was barred from bringing this claim by the six-year statute of limitations of 28 U.S.C. § 2401(a). [5] DuMarce moved for summary judgment that, among other things, section 5 of the Act effected a taking without just compensation. District Judge Charles B. Kornmann denied the government's combined motion for partial summary judgment and to dismiss, reasoning that DuMarce's claim was not barred by the statute of limitations because her claim had not accrued in 1987 as the government had breached its fiduciary duty to her, an Indian, by failing to inform her of her cause of action against the government.

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[4] The "Notice To All Persons Having An Interest In The Subject Matter Of This Proceeding," dated November 24, 1987, informed DuMarce that "[p]art of the decedent's land interests on the Sisseton Reservation are subject to Pub.L. 98-513.... In addition, if the decedent's interest in a parcel of land amounts to less than 2 1/2 acres, then such interest escheats to the Tribe.... Therefore, as set forth above, the decedent's respective interests identified on Exhibit B, which amount to less than 2 1/2 acres, shall escheat to the United States of America in Trust for the Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation."

[5] 28 U.S.C. § 2401(a), titled "Time for commencing an action against the United States," provides in relevant part: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

DuMarce, 277 F. Supp. 2d at 1055. The judge granted DuMarce's motion for summary judgment in part, holding that section 5 of the Act did effect a taking without just compensation. Id. at 1056-67. Based on this May 15, 2003 decision, Dennis DuMarce and Pamela Renville filed similar motions for summary judgment in their separate cases. All of the cases were consolidated on August 4, 2004. On October 22, 2003, the court entered a final Order enjoining "any further use of Section 5 of Public Law 98-513" and ordering the Department of the Interior to "reopen the estates" and "proceed[ ] through the probate procedures as though Section 5 of Public Law 98-513 did not and does not exist." *See DuMarce v. Norton*, Nos. 02-1026, -1040, -1041, 2003 WL 24224102 (D.S.D. Oct. 21, 2003). The government appeals the grant of DuMarce's summary judgment motion, based on the running of the statute of limitations.

DuMarce requested other forms of relief in addition to just compensation, including reopening of Felix Renville's estate and an injunction prohibiting the government from escheating land to the Tribe. Yet in its May 15, 2003 decision the trial court held that the Sisseton-Wahpeton Sioux Act effected a taking without just compensation but "refrain[ed] from ordering any relief at [that] time, save, of course, a declaration that section 5 is unconstitutional." *DuMarce*, 277 F. Supp. 2d at 1056. Nonetheless, in a subsequent Judgment of Dismissal, dated September 29, 2004, the trial court ordered and adjudged, *inter alia*, that the government is "permanently enjoin[ed] and restrained ... from any further use of Section 5 of Public Law 98- 513." *See DuMarce v. Norton*, Nos. 02-1026, -1040, -1041 (D.S.D. Sep. 29, 2004). Thus, because of the permanent injunction, this judgment of the trial court is appealable even though not a final judgment. Because in this case district court jurisdiction was based on a takings claim under the Little Tucker Act, 28 U.S.C. § 1346(a)(2), we have jurisdiction under 28 U.S.C. § 1295(a)(2).

II.

A.

The government argues that the district court erred by holding that the government breached its fiduciary duty by not informing DuMarce of a possible cause of action against the government. The government agrees that it owed DuMarce, a member of the Indian tribe, a fiduciary duty. But, the government asserts, its fiduciary duty did not include informing DuMarce of a possible cause of action against the government. The government contends that it fulfilled its fiduciary duty simply by informing her of the facts pertaining to her potential cause of action. The government clearly did so by notifying her that the land in question would escheat to the Tribe pursuant to section 5 of the Act because it was less than two and a half acres.

DuMarce counters that the government's fiduciary duty to her also requires it to inform her of a potential cause of action. We conclude that the government is correct.

For decades, Federal Circuit precedent has required the government as trustee to inform Indian beneficiaries of the *facts* giving rise to potential causes of action. In *Menominee Tribe of Indians v. United States*, 726 F.2d 718 (Fed. Cir. 1984), the government held in trust for the Indians a plot of forest land which the government, as trustee, was charged with managing. The Indian plaintiffs asserted a breach of fiduciary duty against the government for mismanaging the forest, contending that the government had obtained too low a harvest income on the land and that it knew or should have known that the limited harvest was deleteriously low. Because the Indians filed suit more than six years after the statute of limitations had run, they argued that the government's breach of fiduciary duty had tolled the statute because the Tribe was "excusably ignorant of the facts underlying their claim until it began itself to manage the forest...." *Id.* at 720. Holding that the statute of limitations was not tolled, this Court stated, "It is settled ... that [the statute of limitations] is not tolled by the Indians' ignorance of

their *legal* rights." *Id.* at 721 (citing *Affiliated Ute Citizens of State of Utah*, 199 Ct. Cl. 1004 (1972)) (emphasis in original). "As to the facts, there is here plainly no such *concealment* (e.g., imposition of secrecy) by the defendant as would admittedly toll limitations." *Id.* (citing *Spevack v. United States*, 182 Ct. Cl. 884, 390 F.2d 977 (1968)) (emphasis in original). "In short, '[t]he facts were all available,' and the running of limitations would not be tolled as if they were 'unknowable.' " *Id.* (quoting *Affiliated*, 199 Ct.Cl. at 1004).

Similarly, in *Brown v. United States*, 195 F.3d 1334 (Fed. Cir. 1999), Indian plaintiffs alleged breach of fiduciary duty for misadministration of leases of tribal land. Under the General Allotment Act, each member of the Salt River Pima-Maricopa Indian Community was allotted at least one 10-acre parcel of land. As permitted under the Act, the allottees collectively leased their land as a 160-acre parcel to a corporation for use as a commercial golf course. The lease provided that the lessors would receive fixed quarterly rental payments in addition to a percentage of the gross receipts of the golf course. The receipts were to be submitted to the lessors and the Secretary. After passage of the Indian Self-Determination Act, the Tribe took over all leases on the reservation, including the one at issue, whereby the Tribe assumed control over the administration of and compliance with the leases. Several years later, in 1979, one of the lessors, Brown, requested a certified financial statement of gross receipts and an audit. Upon realizing that the corporation had underreported the gross receipts and therefore underpaid rental income to the lessors, the lessors filed suit in 1999, fourteen years after the statute of limitations had run. The allottees charged the United States with breach of fiduciary duty, maintaining that the government had breached its duty by failing to determine whether the gross receipts reported by the lessee were accurate and thus failed to discover that the lessee was substantially underreporting its gross receipts. The Indians asserted that the statute of limitations should be tolled because of their "excusable ignorance of the claim until they actually knew of the

underreporting as a result of the audit." *Id.* at 1338. We held that the statute of limitations was not tolled because the Indians "knew or should have known of Pima's possible underreporting and underpaying as early as 1979," the date on which Brown requested the certified gross receipts and, thus, that plaintiffs "failed to show that they were excusably ignorant of the breach by the lessee." *Id.*

Furthermore, Brown claimed that the Secretary breached its fiduciary duty by negotiating a lease for 25 years, without regard for the rapidly increasing value of the land, in violation of its trust duties. Again, Brown asserted that the statute of limitations should have been tolled because of the Indians' "excusable ignorance" because "they believed that they were powerless to affect the terms of the original lease due to their minimal role in the negotiations leading to the lease signing." *Id.* at 1339. We explained that plaintiffs' "belie[f] that they were powerless to affect the terms of the original lease ... is a separate and unrelated question. Brown has not demonstrated that the allottees were excusably ignorant of their claim, and therefore we hold that the allottees knew or should have known of the alleged breach...." *Id.*

Finally, in *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573 (Fed. Cir. 1988), the government held land in trust for the resident Indians. The California Rancheria Act terminated this trust relationship. Upon termination of the trust relationship, the land was to be sold and the proceeds to be distributed to eligible individual Indians. Also upon termination of the trust, certain services and benefits provided by the government to the Indians would cease. The trust relationship would formally terminate upon distribution of the assets. Distribution of the assets, however, could not occur until the government and the Indians reached agreement as to certain services and benefits. Nonetheless, the land was sold and the assets were distributed, thereby terminating the trust, without reaching agreement as to the disputed services and benefits. After the services and benefits were terminated, the Indians sued the government for breach of trust, alleging that

the trust relationship had been unlawfully terminated, causing, *inter alia*, loss of the services and benefits to the Indians. Because the suit was filed after the statute of limitations had run, however, the Indians argued that the statute should be tolled because of the organizational difficulties suffered by the Indians due to the unlawful termination by the government. Moreover, the Indians argued, they could not have been aware of the events that fixed liability until the Band (the Indian government) had formally reorganized and the "Band itself was able to know of its injury and act to protect its interests." *Id.* at 1579. Thus, effectively, the Indians argued that the government "concealed from the Band the subsequent acts which resulted in injury to the Band, thereby preventing their discovery until the Band was able to reorganize." *Id.* We noted that it is true that "the statute of limitations can be tolled where the government fraudulently or deliberately conceals material facts relevant to a plaintiff's claim so that the plaintiff was unaware of their existence and could not have discovered the basis of his claim." *Id.* at 1577. In holding that the statute was not tolled, however, we reasoned that "[t]he Band's theory ... ignores the reality that it is through the knowledge of individual persons . . . that such entities gain the actual knowledge of the events which give rise to their potential causes of action. The termination of the Board's charter or the withdrawal of federal recognition did not affect the ability of the individual members to obtain knowledge and those individual members knew or should have known at least by 1967 all the facts which indicated that the sale ... was improper under the Act." *Id.* at 1580. [6]

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[6] One Federal Circuit case cited by DuMarce, *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339 (Fed. Cir. 2004), did hold that the applicable statute of limitations did *not* bar the beneficiary plaintiffs' cause of action. This court reasoned that the plaintiffs could not know the facts that suggested they might have a cause of action because the government trustee had not performed an accounting. *Id.* at 1346. This case, however, is consistent with the Federal Circuit standard discussed above. Indeed, the *Shoshone* panel explained that "the statute of limitations 'shall not commence to run'

Similarly, beyond question, the government's November 24, 1987 Notice informed DuMarce of the facts giving rise to her potential cause of action. As in *Menominee*, the government did not conceal the facts giving rise to DuMarce's cause of action, such that the facts were all available to DuMarce. The statute cannot be tolled due to her ignorance of her legal right to pursue a takings cause of action. Likewise, as in *Brown*, DuMarce knew of the facts, namely, escheat pursuant to Public Law No. 98-513. Moreover, DuMarce's possible belief that she was powerless to sue because of the escheat is not relevant. Finally, as in *Hopland*, DuMarce had actual knowledge of the events which gave rise to her takings cause of action. Thus, the government satisfied its fiduciary duty under the Federal Circuit standard.

Moreover, we must contemplate the potential repercussions if we were to agree with DuMarce. DuMarce is essentially asking the government, as trustee, to act as her personal lawyer. To require the government trustee to act as lawyer to all Indians would require the government to research every possible law for any possible Indian plaintiff, interpret those laws for each Indian, and advise each Indian of every possible cause of action. In this case, for example, the government would have been required to inform DuMarce not only of a possible takings action, but other possible causes of action, such as breach of fiduciary duty or breach of trust. This seems beyond the reasonable scope of the government's duty as trustee, as interpreted in binding precedent, and also unreasonable and impractical.

The dissent asserts that the government had a "duty to inform Colleen Renville DuMarce of an essential fact giving rise to a potential cause of action against the government, *viz.*,

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on any claim until an accounting is provided from which the *Tribe* can discern whether any losses occurred which would give rise to a cause of action against the trustee." *Id.* (emphasis added). Thus, the *Shoshone* panel, too, placed the onus for discovering the cause of action on the trust beneficiary, once fully informed of the facts.

the U.S. Supreme Court's decision in *Hodel v. Irving*, 481 U.S. 703 (1987)." The *Irving* case does not give rise to the takings claim; enactment of the 1984 statute did. The dissent would require the government to help an Indian appreciate the likelihood of success of a possible cause of action, which is the work of counsel--which a trustee is not. DuMarce was notified of the statute and that it took her property interest from her. These two facts, without more, fixed liability. That is all the beneficiary must know. *Cf. Hopland*, 855 F.2d at 1577 ("[A] claim 'first accrues' when all the events have occurred which fix the alleged liability...."). As the district court noted, moreover, DuMarce herself "argu[ed] that, because section 207 had been amended prior to the *Irving* decision, there was sufficient uncertainty surrounding the applicability of *Irving* . . . .That doubt, [DuMarce] contends, was not dissipated until *Youpee* was decided in 1997." *DuMarce*, 277 F.Supp.2d at 1055 (referring to *Babbitt v. Youpee*, 519 U.S. 234 (1997)).

Furthermore, that the statutes in *Irving* and *DuMarce* may be similar does not sufficiently inform the government that the 1984 statute will also be found to constitute a taking. Apparently the government was uncertain of the constitutionality of even slight changes in section 207 because, even though section 207 was found to be a taking in *Irving* in 1987, it was not until ten years later in 1997 that the slightly-amended version of section 207 was found to be a taking in *Youpee*. The government itself was not certain of the constitutionality--to the point that it defended the constitutionality of a slightly-amended version of section 207 ten years later. In addition, regardless of how similar the statutes themselves may be, the facts of each case may be distinguishable. Such a determination requires legal judgment. To assert that, based solely on facial similarity of the statutes, the government should have known that Public Law No. 98-513 would be deemed unconstitutional may oversimplify the process of making legal judgments by analogizing and distinguishing based on facts.

Moreover, even assuming *arguendo*[7] that the *Irving* decision can for any purpose be characterized as a "fact," it is of a different nature than the facts of which the government trustee must inform the Indian beneficiaries under our case law. Specifically, interpreting a court decision requires legal judgment. For example, requiring the trustee to inform the beneficiaries of this Supreme Court decision may require the trustee to inform them of other decisions by various courts. Deciding which cases are similar enough requires legal judgment. Requiring a trustee to inform a beneficiary of a "fact" that requires legal judgment is requiring the trustee to act as a lawyer, a requirement beyond the scope of our case law and beyond the scope of obligations of a trustee.

Additionally, the dissent would extend the type of "fact" of which the trustee must inform the beneficiary far beyond our case law. In *Menominee*, the fact was the harvest volume in their own forest. In *Brown*, the facts were the underreporting of gross receipts and underpayment of the Indians' rental fees. The fact in *Hopland* was the sale of their own land. In none of these cases did we require the trustee to inform the beneficiaries of a later legal event. In none did we require a legal judgment as to whether a "fact" was relevant, as would be the case if the trustee had to determine which decisions were relevant and thus whether a particular decision had to be disclosed to the Indians. Rather, the facts at issue were all historical facts. Finally, in all of these cases, the facts directly affected *them* -- not different parties altogether. These cases did not require the trustee to research case law or other information not directly related to the beneficiaries in question. According to the reasoning of the dissent, a trustee would have to inform a beneficiary of *any* useful type of information, even though not related to the potential

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[7] It is doubtful that "the U.S. Supreme Court's decision in *Hodel v. Irving*" is a "fact" within the meaning of our case law. A judicial decision is ordinarily not considered a liability-creating fact. It is an adjudication based on the application of law to fact. As a court judgment, rather than a fact, the government would not be required to inform DuMarce of *Irving*.

plaintiffs. This is unduly burdensome and requires the trustee to act as counsel by rendering legal advice.

The dissent would expand the fiduciary duty of the government to inform beneficiaries not only of the "facts" giving rise to their causes of action, but of "the *circumstances* surrounding those facts." Our case law does not support such an expansive duty. Nor does the dissent point to any such authority. Requiring a trustee to inform beneficiaries of circumstances surrounding facts creates an indeterminate obligation. While *Hopland* requires the trustee only to inform the beneficiary of facts that fix liability, the dissent would create an undefined requirement of also informing beneficiaries of circumstances that surround those facts. Determining which "circumstances" must be reported to the beneficiaries requires legal judgment also, especially if judicial decisions are deemed "circumstances." It requires the trustee to make the legal judgment of similarity of cases based not only on the holdings of cases and the statutes at issue in each case, but on the facts of each case.

Finally, the dissent asserts: "it represents a clear conflict of interest between the government's role as trustee for DuMarce and its role in enforcing an unconstitutional statute against her. That conflict should have heightened the government's duty to inform its beneficiary." There is, however, no conflict of interest between two governmental roles if the government is enforcing a constitutional statute vis-à-vis DuMarce. If the government is enforcing a statute that it believes to be constitutional, then there is no conflict of interest, and hence no "heightened" duty to inform DuMarce of anything.

The district court relied on *Loudner v. United States,* 108 F.3d 896 (8th Cir. 1997), early in its discussion of the government's fiduciary duty to Indian beneficiaries, referring to a nebulous "somewhat lessened" duty of the beneficiary "to discover claims against the trustee." *DuMarce,* 277 F. Supp. 2d at 1055 (quoting *Loudner,* 108 F.3d at 901). Yet in

holding that the government breached its fiduciary duty to Indians so as to toll the statute of limitations, the trial court simply reasoned, "It does seem odd that the government, as trustee, would advance an argument requiring the trust beneficiary, a non-lawyer, to actively investigate whether she has claims against the trustee.... [T]he court finds, as a matter of law, that the government breached a fiduciary duty owed to her by failing to inform her of her potential cause of action against the United States," *id.* at 1055, making a leap of logic from the vague *Loudner dicta* it cited earlier.

In *Loudner,* the government had established a judgment fund to satisfy financial liabilities owed to members of the Sisseton-Wahpeton Sioux Tribe. Plaintiffs did not know of the existence of the fund. When they learned of the fund, after the statute of limitations period, they filed suit to recover their share of the fund. The Court of Appeals for the Eighth Circuit held that the government, as trustee of the fund, breached its duty to plaintiffs because it had not informed them of the existence of the fund. "Because plaintiffs had no reason to know of the existence of the judgment fund and, consequently, of their possible claim to it, they have a strong argument that the statute of limitations did not begin to run on their claim until they received actual notice of the fund's *existence* . . . ." *Loudner,* 108 F.3d at 901 (emphasis added).

The district court in this instant case misinterpreted *Loudner* to require the government to inform its beneficiary Indians of their potential cause of action against the government. *DuMarce,* 277 F. Supp. 2d at 1055. We reject this interpretation of *Loudner*. *Loudner* did not find breach of duty based on failure to inform the plaintiffs of their cause of action, but based solely on failure to inform the plaintiffs of the existence of the fund. The Eighth Circuit did state, "The statute of limitations begins to run when a trust beneficiary knows or should know of the beneficiary's claim against the trustee. Nonetheless, because the beneficiary is entitled to rely upon the good faith and expertise of the trustee, the beneficiary's duty to discover claims against the trustee is

somewhat lessened." 108 F.3d at 901 (citing *Manchester Band of Pomo Indians v. United States*, 363 F.Supp. 1238 (N.D. Cal. 1973)). This is *dicta.* Moreover, even a "somewhat lessened" duty to discover claims on the part of the Indian beneficiaries does not justify requiring the government to inform every beneficiary of possible causes of action. In any event, at most *Loudner* is persuasive authority which we may and do disregard.

B.

While the trial court based its decision on a view of the fiduciary duty that we reject, DuMarce raises other issues, two in particular. On appeal, DuMarce asserts for the first time that the statute of limitations of 28 U.S.C. § 2401(a) does not apply to her cause of action. DuMarce reasons that her suit is not against the United States or a takings claim, but rather is solely against the Secretary of the Interior for non-monetary relief because among the forms of relief she requests is the reopening of her father's estate. Because section 2401(a) only applies to suits against the United States, she argues, its limitations period does not apply. We decline to address this argument because DuMarce did not raise this argument before the trial court, according to the record. As the trial court noted in its opinion: "The government argues that the six-year statute of limitations contained in the Little Tucker Act controls. *See* 28 U.S.C. § 2401. The plaintiffs offer no alternative." *DuMarce,* 277 F.Supp.2d at 1054. In any event, on its face, her lawsuit was against the United States and was plainly a takings case.

C.

The final issue is whether the equitable tolling applies to DuMarce's takings claim.[8] DuMarce asserts that, in addition

[8] On appeal, DuMarce argues for the first time that equitable estoppel also precludes a time bar on her claim. Because the record reflects that she did not raise the equitable estoppel argument below, we decline to address it.

to tolling based on breach of fiduciary duty, the statute of limitations should be tolled in her case based on equitable principles. She simply states that, although "the principles of equitable tolling do not extend to what is at best a 'garden variety claim of excusable neglect,' " hers is not such a case because she brought her claim three years after the Secretary of the Interior in 1999 ordered the reopening of certain escheated Indian estates based on the holding of *Youpee*, that the escheat provision of the Indian Land Consolidation Act of 1983 was an unconstitutional taking without just compensation.[9]

The government responds that the Department of the Interior did not engage in any misconduct, let alone the trickery or misleading conduct needed for equitable tolling, because it notified DuMarce of all the facts relevant to her claim. We agree with the government.

"[E]quitable tolling against the federal government is a narrow doctrine" that requires "a compelling justification for the delay." *Martinez v. United States,* 333 F.3d 1295, 1318 (Fed. Cir. 2003) (*en banc*). Indeed, "[f]ederal courts have typically extended equitable relief only sparingly." *Frazer v. United States,* 288 F.3d 1347, 1353 (Fed. Cir. 2002) (quoting *Irwin v. Dep't of Veterans Affairs,* 498 U.S. 89, 96 (1990)). For equitable tolling to apply, the defendant must be "induced or tricked" by government misconduct. *Id.* (quoting *Irwin,* 498 U.S. at 96). DuMarce makes a single allegation of misconduct by the government, namely, that "the Secretary, at least constructively, knew Section 5 of P.L. 98-513 was similarly unconstitutional." Yet DuMarce fails to cite a single case that supports her contention that this single act--of

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[9] DuMarce alleged that Public Law 98-513 was "similarly unconstitutional" to section 207 of the Indian Land Conservation Act of 1983, which was found to be a taking without just compensation in violation of the Fifth Amendment in *Irving*. The amended version of section 207 was found to be a taking without just compensation in *Youpee*.

sending notice of the escheat and of the law governing the escheat--reaches the "sparing[ ]" level of "trick[ery]" or misconduct required for equitable tolling.

It is true that the amended escheat provision of the Indian Land Consolidation Act of 1983 which was held to constitute a taking without just compensation is *similar* to section 5 of Public Law No. 98-513.[10] Yet this fails to establish that in 1987 the Secretary "knew" that section 5 of Public Law No. 98-513 was unconstitutional. The similarity of the two escheat provisions fails to establish that the Secretary of the Interior engaged in "trick[ery]" or misconduct by sending DuMarce the November 24, 1987 Notice.

III.

We disagree with the trial court that the law imposes on the government in its role as a trustee to Indians a duty to notify an Indian of possible lawsuits, as opposed to the facts possibly giving rise to such causes of action. Because the government, as a fiduciary to DuMarce, fulfilled its duty to inform her of the facts giving rise to a potential lawsuit by sending her the November 24, 1987 Notice, the six-year statute of limitations of 28 U.S.C. § 2401(a) which governs DuMarce's claim was not tolled by the alleged breach of fiduciary duty by the government. Nor does equity defeat this otherwise applicable statute of limitations. Thus, her filing of her takings claim fourteen years after her cause of action accrued on November 24, 1987, precludes district court jurisdiction under the 28 U.S.C. § 2401(a) six-year statute of

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[10] Section 207 of the Indian Land Consolidation Act of 1983 provides: "No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descedent [sic] by testacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat." Pub.L. No. 97-459 (1983).

limitations. Therefore the district court's grant of summary judgment to plaintiffs and direct dismissal of DuMarce's claim of a taking without just compensation is

REVERSED

United States Court of Appeals,
Federal Circuit

No. 05-1104.

Harvey DuMarce, Kenneth Ervin Dumarce, Colleen Renville Dumarce, Pamela
Renville, and Dennis L. Dumarce, Sr., Plaintiffs-Appellees,

v.

P. Lynn Scarlett, Acting Secretary of the Interior, Department of the Interior,
and United States, Defendants-Appellants.

LOURIE, *Circuit Judge*, dissenting.

I respectfully dissent from the majority's reversal of the district court's decision because I believe that the government, as trustee of the land involved here, had a duty to inform Colleen Renville DuMarce of an essential fact giving rise to a potential cause of action against the government, *viz.*, the Supreme Court's decision in *Hodel v. Irving*, 481 U.S. 704 (1987).

The district court correctly held that the fiduciary relationship that the government assumed with respect to DuMarce entitled the court to toll the statute of limitations, thereby permitting DuMarce to recover for the unconstitutional taking of the land that she was apparently entitled to under the terms of her father's will. The majority opinion articulates as the "Federal Circuit rule" that the government, as trustee, is required to inform Indian beneficiaries, such as DuMarce, only "of the *facts* giving rise to potential causes of action." The opinion then proceeds to conclude that the government, through a Notice dated November 24, 1987, provided DuMarce with sufficient "facts

giving rise to her potential cause of action." I disagree with that conclusion.

The November 24, 1987 Notice, a document drafted like a judicial opinion, replete with legal jargon, informed DuMarce, a non-lawyer, that:

> Part of the decedent's land interests on the Sisseton Reservation are subject to Pub.L. 98-513, 9 Stat. 2411, entitled "An Act Pertaining to the Inheritance of Trust or Restricted Land on the Lake Traverse Indian Reservation in North and South Dakota" enacted October 19, 1984. That the Act provides, among other things, that the decedent's heirs or devisees must be enrolled members to be eligible to a life estate and the title to the land escheats (passes) to the Tribe. In addition, if the decedent's interest in a parcel of land amounts to less than 2 1/2 acres, then such interest escheats to the Tribe (unless the land is located with a municipality) even though the decedent's heirs are enrolled members of the tribe. Any property of a person dying before April 17, 1985 with a valid Will is not affected by this law.

The Notice then informed DuMarce that she owned less than a 2 1/2 acre property interest, and thus that her property would escheat to the United States in trust for the tribe. What the Notice did not inform DuMarce of, however, is that a similar law was struck down over six months earlier by the United States Supreme Court in *Irving*. The existence of that Supreme Court decision is arguably a fact that a trustee should have told its beneficiary. Even if it is not truly a "fact," a trustee, having a fiduciary relationship to its beneficiary, should have been expected to inform its beneficiary concerning it.

As stated by the district court, the Supreme Court in Irving considered a takings claim "nearly identical to [the one] advanced in this case," and declared the statute at issue

in that case, § 207 of the Indian Land Consolidation Act of 1983, to be unconstitutional.[1] *DuMarce*, 277 F. Supp. 2d at 1053. Relying on the holdings of *Irving* and a subsequent Supreme Court case striking down an amended version of § 207, *Babbitt v. Youpee*, 519 U.S. 234 (1997), the district court had "little trouble in concluding that section 5 [of the Sisseton-Wahpeton Sioux Act of 1984] violates the Fifth Amendment." *Id.* Given that the only meaningful difference between § 207, which was considered in *Irving*, and § 5, applicable to this case, is the criterion for determining when an inherited property interest is too small to be devised, I agree with the district court that the claims in these two cases are "nearly identical." Given the identity of the claims of the two cases, the holding of *Irving* could have assisted DuMarce in realizing that she may have had a potential cause of action against the government within the statute of limitations period. Moreover, DuMarce may have found it useful to know that the Supreme Court criticized a similar statute as "extraordinary" in that it "amounts to a virtual abrogation of the right to pass on a certain type of property--the small undivided interest--to one's heirs." *Irving*, 481 U.S. at 716. Unfortunately, the government, as trustee, never informed DuMarce of the existence of the *Irving* ruling.

I do not believe that requiring the government to have informed DuMarce of the Supreme Court's decision in *Irving* during the relevant time period is tantamount to requiring the government to act as DuMarce's personal attorney, a legitimate policy concern of the majority. Informing a beneficiary of facts, as well as the circumstances surrounding those facts, such as the *Irving* decision, is not the same as acting as the beneficiary's attorney. The nullification of § 207 was information that the government knew would have

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[1] Under § 207, "[N]o undivided factional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descedent [sic] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat."

potentially allowed DuMarce to recognize her cause of action before the statute of limitations had run. The government, as trustee, had the duty of informing its beneficiary that the Supreme Court had struck down a law very similar to that which the "trustee" was currently enforcing against the "beneficiary" against the beneficiary's interest. Aside from being essentially within the majority's "Federal Circuit rule" requiring disclosure of facts, it represents a clear conflict of interest between the government's role as trustee for DuMarce and its role in enforcing an unconstitutional statute against her. That conflict should have heightened the government's duty to inform its beneficiary.

I therefore dissent from the majority's contrary decision and would affirm the district court's decision.

APPENDIX B

United States Court of Appeals,
Federal Circuit.

No. 2005-1104.

Harvey DuMarce, Kenneth Ervin Dumarce, Colleen Renville Dumarce, Pamela
Renville, and Dennis L. Dumarce, Sr., Plaintiffs-Appellees,

v.

Dirk Kempthorne, Secretary of the Interior, Department of the Interior,
and United States, Defendants-Appellants.

On Petition for Rehearing En Banc.

Before MICHEL, *Chief Judge*, NEWMAN, MAYER, LOURIE, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, PROST, and MOORE, *Circuit Judges*.

ORDER

A petition for rehearing en banc was filed by the Appellees, and a response thereto was invited by the court and filed by the Appellants. The matter was referred first as petition for panel rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response were referred to the circuit judges who are authorized to request a poll whether to rehear the appeal en banc. A poll was requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The petition for rehearing is denied.

(2) The petition for rehearing en banc is denied.

(3) The mandate of the court will issue on October 11, 2006.

GAJARSA, *Circuit Judge*, dissents in a separate opinion, in which NEWMAN, *Circuit Judge*, joins.

FOR THE COURT
Jan Horbaly
Clerk

Oct. 4, 2006
Date

United States Court of Appeals,
Federal Circuit.

No. 2005-1104.

Harvey DuMarce, Kenneth Ervin Dumarce, Colleen Renville Dumarce, Pamela
Renville, and Dennis L. Dumarce, Sr., Plaintiffs-Appellees,

v.

P. Lynn Scarlett, Acting Secretary of the Interior, Department of the Interior,
and United States, Defendants-Appellants.

GAJARSA, *Circuit Judge*, with whom *Circuit Judge* NEWMAN joins, dissents from the denial of en banc hearing.

I must dissent from the failure of this court to review this matter *en banc*. I believe that the panel's decision reversing the district court's judgment in this case merits reconsideration en banc in light of the Supreme Court's recent decision in *Jones v. Flowers*, 126 S.Ct. 1708 (2006). The due process principles announced in *Jones* suggest that the notice provided by the government to the plaintiffs in this case was constitutionally inadequate. If the notice failed the requirements of due process, it certainly also violated the government's fiduciary duty to inform DuMarce of all the facts giving rise to her cause of action. Violation of that fiduciary duty, in turn, requires the equitable tolling of the statute of limitations. *See Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984).

In *Jones*, the Supreme Court notes the long-settled principle that notice of a deprivation "must be such as one desirous of actually informing" the recipient "might reasonably adopt to accomplish it," and must take "due regard

for the practicalities and peculiarities" of the individual circumstances. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). *Jones* addresses whether one particular "circumstance and condition"--knowledge by the state that its initial attempt to provide notice of a property forfeiture has failed--acts to vary the constitutionally required notice. *Jones*, 126 S. Ct. at 1714. It holds that such knowledge does increase the notice due, requiring the government to take enhanced measures to provide notice. *Id.* at 1718.

Dumarce's case, like Jones's, involves a property forfeiture. The question is whether the notice provided to DuMarce was constitutionally adequate in light of the "circumstances and conditions" in which it was delivered. I believe that it was not, and that the principles of *Jones* required us to reconsider DuMarce's case *en banc*.

The government's notice to DuMarce in this case stated simply that "[p]art of [her father's] land interests in the Sisseton Reservation are subject to Pub.L. 98-513.... In addition, if the decedent's interest in a parcel of land amounts to less than 2 1/2 acres, then such interest escheats to the Tribe.... Therefore, as set forth above, the decedent's respective interests ... shall escheat to the United States."

Few lay people would understand the drastic import of the legalism "escheat." One enterprising enough to consult a common dictionary in 1987 would have found the following unilluminating definition: "1: escheated property 2 a: the reversion of lands in English feudal law to the lord of the fee when there are no heirs capable of inheriting under the original grant b: the reversion of property to the crown in England or to the state in the U.S. when there are no legal heirs." *Webster's Ninth New Collegiate Dictionary* at 424 (1985).

Nothing in the notice or in the definition of "escheat" makes clear to the recipient the critical fact that the federal

government will take her land *without compensation*. It is the fact of noncompensation that gives rise to DuMarce's takings claim and is therefore the relevant fact in determining when her cause of action accrued. It is arguable, in my judgment, whether the government's notice to DuMarce was sufficient under *any* "circumstances and conditions." It seems clear to me under the principles of *Jones* that such a notice is insufficient where, as here, the relevant "circumstance and condition" is the fiduciary relationship between the government and the recipient.

In *Jones*, the Supreme Court emphasizes that the amount and nature of notice required by due process must take into account "unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *Jones*, 126 S. Ct. at 1716. A fiduciary relationship between the government and the intended recipient certainly constitutes such "unique information"--especially in light of other relationships that have been consistently held to increase the government's notice obligations. Where, for example, the notice recipient is a ward of the state (such as a prisoner), the government has been held to a higher standard of notice. *See, e.g., Weng v. United States*, 137 F.3d 709 (2d Cir. 1998) (holding that where the recipient is a federal prisoner, the government is required to provide him with actual notice of a deprivation); *United States v. Woodall*, 12 F.3d 791, 794-95 (8th Cir. 1993) (same). It would be a strange result indeed if the government's role as prison warden increases its duty to provide adequate notice, but its role as trustee to Native Americans does not.

In short, I believe that the Supreme Court's decision in *Jones* requires us to conclude that the notice of forfeiture provided to DuMarce was constitutionally inadequate in the context of the "practicalities and peculiarities" of her situation--namely, the government's fiduciary duty to her as trustee. *Id.* A notice that was even arguably inadequate as a matter of minimum constitutional requirements could not

possibly satisfy the government's independent fiduciary duty to inform DuMarce of all the facts giving rise to her cause of action. The government's failure to satisfy its fiduciary duty renders DuMarce's ignorance of the relevant facts excusable, and acts to toll the applicable statute of limitations. *See Menominee Tribe of Indians*, 726 F.2d at 721.

For these reasons, I believe the court should consider this matter *en banc*.

APPENDIX C

United States District Court,
District of South Dakota
Northern Division.

Harvey DuMarce, Kenneth Dumarce, and Colleen Renville Dumarce,
Plaintiffs,
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors
in office, the Department of the Interior of the United States, and the United
States, Defendants.

No. CIV 02-1026.

May 15, 2003.

MEMORANDUM OPINION AND ORDER

KORNMANN, United States District Judge.

[¶1.] Harvey DuMarce, Kenneth DuMarce, and Colleen Renville DuMarce (collectively "the plaintiffs") instituted this action seeking declaratory, injunctive and monetary relief against the United States, the Department of the Interior, and the Secretary of Interior, Gale Norton, (collectively "the government"), alleging that section 5 of the Sisseton-Wahpeton Sioux Act of October 19, 1984, P.L. 98-513, 98 Stat. 2411 ("the Act"), unlawfully took land in which the plaintiffs had or would have had a legal interest, the taking being without just compensation and thus in violation of the Fifth Amendment to the United States Constitution. Small undivided interests in Indian allotments, instead of passing to the plaintiffs upon the death of their relatives, escheated to the

United States to hold in trust for the Sisseton-Wahpeton Sioux Tribe.

[¶2.] The government, pursuant to Fed.R.Civ.P. 12(b)(1), filed a motion to dismiss, challenging this court's jurisdiction. In addition, as an alternative, the government, pursuant to Fed.R.Civ.P. 56, filed a motion for summary judgment. The plaintiffs, in turn, have filed their own motion for summary judgment.

FACTUAL BACKGROUND

[¶3.] This case requires a "look back" to 1887. In that year, Congress passed the General Allotment Act of 1887, more commonly known as the Dawes Act, Ch. 119, 24 Stat. 388. The Dawes Act mandated the allotment of Indian reservation lands. *See generally*, F. Cohen, Handbook of Federal Indian Law, pp. 130-144, (1982 ed.). The purpose of allotment, according to its advocates, was to force Indians to abandon their traditional ways in order to "speed the Indians' assimilation in American society." *Solem v. Bartlett*, 465 U.S. 463, 466 (1984). More important, however, was the desire by allotment advocates to open up vast ranges of Indian reservation land for white settlement. *See* F. Cohen, *supra*, at 132 (stating that "[t]he pressure for Indian land was a powerful motivating force for the allotment policy"). Under the Dawes Act and a specific allotment act aimed at the Sisseton-Wahpeton Indian Reservation, Act of March 3, 1891, 26 Stat. 1035 (ratifying the 1889 agreement[1] between the government and the Tribe), Congress allotted each Tribal

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[1] As a part of that 1889 Agreement, the Sisseton-Wahpeton Sioux Tribe agreed to cede all un-allotted land to the United States for various amounts of money over time. The purpose was to allow white settlers and railroads access to lands previously held exclusively by the Tribe. For an expansive history of these events, see *DeCoteau v. District County Court*, 420 U.S. 425 (1975) (holding that the Sisseton-Wahpeton Lake Traverse Reservation was terminated, in large part, by the 1889 Agreement).

member 160 acres. 25 Stat. 1035. In order to supposedly protect the allottees from selling their lands to white settlers at disastrous prices, the allotment statutes provided that the allotted lands were to be held in trust by the United States. *See Hodel v. Irving*, 481 U.S. 704, 707 (1987). There was, at that time, a view that the bureaucratic framework generally operated to safeguard Indian ownership of the allotted lands.[2] *Irving*, 481 U.S. at 707.

[¶4.] In 1934, the allotment era was officially ended with the passage of the Indian Reorganization Act of 1934, Ch. 576, 48 Stat. 984. At that time, Congress changed its philosophy towards America's indigenous populations. Instead of trying to force western culture and society upon them, Congress decided to promote tribal self-government and tribal ownership of land. *See* F. Cohen, *supra*, at 147. The hope was that tribes, by and through their tribal governments, would interact with and adapt to a "modern world," rather than have that world and assimilation forced upon them. *Id.* The allotment process was abolished and individual allotments were indefinitely held in trust by the United States government. *Id.* at 148.

[¶5.] The Indian Reorganization Act, however, left unaffected the Dawes Act's procedures for the devise and descent of allotted land. Thus, when an allottee died, his interest in an allotted piece of land passed via the state's laws of intestacy or according to his or her will. After successive generations, acres of allotted land became incredibly splintered and owned, in some cases, by hundreds of

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[2] Despite Congress's paternalistic attempt to protect individual Indians from their own lack of familiarity in negotiating land sales and the shrewd cunningness of white land settlers and prospectors, the Dawes Act and its allotment requirements were utterly disastrous for Native Americans. By 1934, with the passage of legislation ending the allotment program, nearly 90 million acres of tribal land had been lost, about two-thirds of the total acreage held by tribes in 1887. *See* F. Cohen, *supra*, at 614 (recognizing the widely held belief that the allotment policy "had been terribly harmful" to Native Americans).

individuals. Such fractionation, as the problem was labeled by some, created a problem, both administratively and practically, that grew and grew over time. *Irving*, 481 U.S. at 707. Fractionation proved to be a bureaucratic nightmare that stymied economic development on Indian reservations and left many acres of potentially productive ground useless.[3]

[¶6.] An example of fractionation and the chaos that it causes on the Sisseton-Wahpeton Reservation was clearly illustrated by the United States Supreme Court in *Irving*. As the Court explained

> [f]orty-acre tracts on the Sisseton-Wahpeton Lake Traverse Reservation, leasing for about $1,000 annually, are commonly subdivided into hundreds of undivided interests, many of which generate only pennies a year in rent. The average tract has 196 owners and the average owner [has] undivided interests in 14 tracts. The administrative headache this represents can be fathomed by examining Tract 1305, dubbed "one of the most fractionated parcels of land in the world." [Citation omitted.] Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually.

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[3] Most fractionated land is rented to ranchers or farmers. While the land is productive from that standpoint, such rents produce nearly nothing to the individual Indian owners as hundreds of people can own an interest that is, in and of itself, a mere fraction of the overall original allotment.

Irving, 481 U.S. at 712-13. From everyone's viewpoint, therefore, the allotment program that began in 1887 and ended in 1934 still produces great difficulties today.

[¶7.] In an attempt to alleviate those difficulties and end the perpetual fractionation of allotted land, Congress, in the early 1980's, took action and passed the Indian Land Consolidation Act of 1983. The overriding aim was to prevent very small fractional interests from passing to a new generation. Instead of letting such interests pass to a new generation, thereby exacerbating the problem, Congress desired to have such small interests escheat to the relevant Indian tribe. Section 207, the escheat provision, provided that

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descedent [sic] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

[¶8.] One year later, in 1984, Congress amended section 207 in three relevant respects. *See* P.L. 96-60 § 1(4), 98 Stat. 3137. The first important change altered the relevant time frame for determining whether the land produced more than $100.00. It lengthened that time period to five years. The second important change permitted one to devise a fractional interest (otherwise covered by section 207) to an individual who already owned an undivided interest in the same parcel of land. The final change permitted the Indian tribes to override section 207 through the adoption and implementation of their own codes governing the disposition of fractional interests.[4] Neither the original section 207 nor

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[4] It appears that no Indian tribe has utilized this statutory override provision and developed its own procedures. *See Babbitt v. Youpee*, 519 U.S. 234, 245 (1997).

the amended version of it contained provisions for the payment of any compensation.

[¶9.] At that same time, Congress passed a specific statute to address the extreme fractionation occurring on the Sisseton-Wahpeton Indian Reservation, P.L. 98-513. Section 5 of that legislation provided, in relevant part, that

> no person shall be entitled by devise or descent to take any interest ... less than two and one-half acres, or the equivalent thereof, in trust or restricted land within the reservation. Any interest less than two and one-half acres of a devisee or intestate distributee of a decedent ... shall escheat to the tribe and title to such escheated interest shall be taken in the name of the United States in trust for the tribe: Provided, That [sic] the provisions of this section shall not be applicable to the devise or descent of any interest in trust or restricted land located within a municipality.

P.L. 98-513, Section 5. It is this section that is at issue here.

[¶10.] The instant dispute, while having its origins in the confused and misguided history of Congress's dealings with America's Indian tribes, began, at least as to plaintiff Colleen Renville DuMarce, when her father, Felix Renville, Sr., died in 1986. At the time of his death, Mr. Renville owned an interest in four parcels of land located on the Sisseton-Wahpeton Indian Reservation. The four parcels comprised a total of 4.86 acres worth an estimated $1,587. Mr. Renville died testate and his will named Colleen as a devisee. The land, however, escheated to the Tribe pursuant to section 5 of P.L. 98-513.

[¶11.] Plaintiffs Harvey DuMarce and Kenneth Ervin DuMarce became engulfed in the allotment mess when their brother, Gerald Leon DuMarce ("Gerald"), died in 1995. At the time of his death, Gerald owned an interest in sixteen parcels of land located on the Sisseton-Wahpeton

Reservation. The sixteen parcels produce a total acreage of 11.8 acres and are valued at $2,712.75. Gerald died intestate. While the court is unsure of exactly who all of Gerald's heirs are, it is undisputed that both Harvey and Kenneth, his brothers, are two of his lawful heirs. They, however, did not take title to the land; instead, it escheated to the Tribe pursuant to section 5 of P.L. 98-513.

[¶12.] On June 26, 2002, the plaintiffs filed suit, arguing that the land that escheated to the Tribe pursuant to section 5 was an unconstitutional taking of private property without just compensation in violation of the Fifth Amendment to the United States Constitution. The plaintiffs seek this court's declaration that section 5 violates the just compensation clause of the Fifth Amendment. They also seek an injunction prohibiting the defendants from escheating lands in the Sisseton-Wahpeton Indian Reservation to the Tribe pursuant to section 5, the restoration to the rightful owners of the lands unlawfully taken, the payment of just compensation for the plaintiffs' loss of use of the escheated lands prior to restoration, or, if the court were not inclined to order such relief, just compensation for the taking of the escheated lands.[5] For the reasons detailed below, the court believes the government's motions should be denied and the plaintiffs' motion for summary judgment should be granted, in part.

DISCUSSION

I. MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

[¶13.] "Federal courts are not courts of general jurisdiction and have only the power that is authorized by Article III of the Constitution and statutes enacted by Congress pursuant thereto." *Marine Equipment Management Co. v. U.S.*, 4 F.3d

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[5] The plaintiffs limit all of their damage requests to an amount less than $10,000. If a larger amount were sought, this court would not have jurisdiction; the Federal Court of Claims would have sole jurisdiction. See The Tucker Act, 28 U.S.C. § 1491.

643, 646 (8th Cir. 1993), citing *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 554 (1986), citing in turn *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803). "The threshold inquiry in every federal case is whether the court has jurisdiction" and the Eighth Circuit has admonished district judges to be attentive to a satisfaction of jurisdictional requirements in all cases. *See Sanders v. Clemco Industries*, 823 F.2d 214, 216 (8th Cir.1987).

[¶14.] A motion for lack of subject matter jurisdiction challenges the court's power to hear the case. *Mortensen v. First Federal Savings and Loan Association*, 549 F.2d 884, 891 (3rd Cir. 1977). Jurisdictional issues are for the court to decide, and the court has broad power to decide its own right to hear a case. *Osborn v. United States*, 918 F.2d 724, 729 (8th Cir. 1990) (quoting *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981)). Because jurisdiction is a threshold question, judicial economy demands that the issue be decided at the onset. *Osborn*, 918 F.2d at 729.

[¶15.] The legal basis for the government's motion to dismiss for lack of jurisdiction rests upon its argument that the United States is immune from suit. It is well-settled that the United States, as a sovereign nation, is immune from suit except as it consents to be sued, and the terms of its consent to be sued define the contours of the court's jurisdiction. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980), and *United States v. Sherwood*, 312 U.S. 584, 586 (1941). In advancing this argument, the government attempts to cast this case as a dispute about the ownership of the escheated lands, *i.e.*, a dispute about title to real property. From that vantage point, the government argues at length that the Quiet Title Act, 28 U.S.C. § 2409a, governs this case and that it expressly prohibits challenges to land held in trust for Indian tribes.

[¶16.] Whatever merit that argument, if any, might have, it is not applicable here. There is no dispute about who currently has title to the property in question. The United States has title to the property and is holding it in trust for the Sisseton-

Wahpeton Sioux Tribe. The plaintiffs do not dispute that fact; they expressly acknowledge that the government has title to the property. Nothing in the plaintiffs' amended complaint hints that this is a title dispute case. To the contrary, the entire amended complaint speaks in terms of unconstitutional takings of private property in violation of the Fifth Amendment. In sum, there is no dispute that the United States currently has title to the property. While the plaintiffs, by way of relief, may want title to the property restored to them, the plaintiffs do not dispute that the United States currently has title to the property. The government, it seems, has seized upon the plaintiffs' remedial request and has attempted to convert a rather unremarkable takings case into a quiet title action. The court will not follow the government's lead. There is no need to do so as the case is rightly denominated as a Fifth Amendment takings case. Thus, the Quiet Title Act does not apply here. The government's motion to dismiss should be denied. Jurisdiction is proper in this court.

II. CROSS-MOTIONS FOR SUMMARY JUDGMENT

[¶17.] The summary judgment standard is well known and has been set forth by this court in numerous opinions. *See Hanson v. North Star Mutual Insurance Co.*, 1999 DSD 34 ¶ 8, 71 F. Supp. 2d 1007, 1009-1010 (D.S.D. 1999), *Gardner v. Trip County*, 1998 DSD 38 ¶ 8, 66 F. Supp. 2d 1094, 1098 (D.S.D. 1998), *Patterson Farm, Inc. v. City of Britton*, 1998 DSD 34 ¶ 7, 22 F. Supp. 2d 1085, 1088-89 (D.S.D. 1998), and *Smith v. Horton Industries*, 1998 DSD 26 ¶ 2, 17 F. Supp. 2d 1094, 1095 (D.S.D.1998). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Donaho v. FMC Corp.*, 74 F.3d 894, 898 (8th Cir. 1996). "Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1326 (8th Cir. 1995).

[¶18.] As noted above, both parties have filed motions for summary judgment. The government's motion for summary judgment consists of two separate, unrelated arguments: (1) that the applicable statute of limitations prohibits plaintiff Colleen Renville DuMarce from obtaining any relief, and (2) that section 5 is constitutional because monetary relief is available under the Little Tucker Act, 28 U.S.C. § 1346(a)(2). The plaintiffs' motion for summary judgment is a direct attack on the constitutionality of section 5 itself. In unraveling the somewhat twisted summary judgment arguments, the court will first address the issue of section 5's constitutionality. That analysis will necessarily resolve the government's arguments concerning the Little Tucker Act. The court will then turn to the specific statute of limitations arguments raised by the government in regards to the claims of plaintiff Colleen Renville DuMarce.

A. CONSTITUTIONALITY OF SECTION 5

[¶19.] The Takings Clause of the Fifth Amendment of the United States Constitution, provides: "[N]or shall private property be taken for public use, without just compensation." "As its language indicates ..., this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). Government action that takes property or property rights necessarily implicates the "constitutional obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[¶20.] In determining whether a taking has occurred, the Supreme Court does not employ a set formula but engages in essentially "ad hoc, factual inquiries." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). That process, however, is not without standards. "The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance." *Loretto v. Teleprompter Manhattan*

CATV Corp., 458 U.S. 419, 426 (1982). "So, too, is the character of the governmental action." *Penn Central*, 438 U.S. at 124. When the governmental action constitutes actual physical occupation of the property, compensation for such a physical takeover is *never* denied. *See Loretto*, 458 U.S. at 428 n. 5, quoting Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv.L.Rev. 1165, 1184 (1967) (emphasis in original).

[¶21.] Fortunately, the United States Supreme Court has twice before considered takings claims nearly identical to those advanced in this case. In *Hodel v. Irving*, 481 U.S. 704 (1987), the Supreme Court declared that section 207 of the Indian Land Consolidation Act of 1983 was unconstitutional. In reaching that decision, the Court noted that "the right to pass on valuable property to one's heirs is itself a valuable property right." *Id.* at 715. That right, the Court observed, "has been part of the Anglo-American legal system since feudal times." *Id.* 716. Section 207 extinguished that important property right by requiring small undivided interests in allotted lands to escheat to the relevant Indian tribe. Such a total abrogation of the right to pass property to one's heirs, the Court determined, could not be upheld. *Id.* at 717. Similarly, in *Babbitt v. Youpee*, 519 U.S. 234 (1997), the Supreme Court declared that the amended version of section 207 was unconstitutional as well. The Court noted that *Irving* and the unconstitutionality of section 207 primarily rested on the "extraordinary" character of the governmental regulation, *i.e.*, the total abrogation of a property owner's right to pass on his property interests to his heirs. *Id.* at 244. The amendments to section 207 "miss [ed] the point," the Supreme Court determined, because they did nothing to alter the escheat provisions requiring small, undivided interests in allotted parcels to escheat to the tribe. *Id.* at 243.

[¶22.] As the plaintiffs in this case aptly point out, there is very little that differs between section 207, amended 207, and

section 5 of the Sisseton-Wahpeton Sioux Act. Most importantly, the statutes cut-off a decedent's ability to pass his or her undivided interest in allotted parcels to his or her heirs by both devise and descent. Instead of passing to one's heirs, the interest, in a case governed by section 5, passes to the United States as trustee for the benefit of the Sisseton-Wahpeton Sioux Tribe. The governmental regulation, therefore, remains "extraordinary." *Irving*, 481 U.S. at 716. The right of an enrolled member of the Sisseton-Wahpeton Sioux Tribe to pass on small undivided interests in allotments is completely abrogated. In light of the Supreme Court's holdings in both *Irving* and *Youpee*, this court has little trouble in concluding that section 5 violates the Fifth Amendment. It is a complete taking of the property.

[¶23.] Instead of really addressing *Irving* and *Youpee*, the government, in arguing that section 5 passes constitutional muster, contends that, because compensation is available under the Little Tucker Act, 28 U.S.C. § 2401(a)(2), section 5 comports with the Fifth Amendment. Such an argument, however, completely ignores both *Irving* and *Youpee*. In neither case did the Supreme Court hesitate to strike down section 207 and amended 207 because of the Little Tucker Act. In fact, the Little Tucker Act is never mentioned in either opinion. That silence speaks volumes. This court will not assume that the Supreme Court, and the government lawyers appearing before it on behalf of the United States, "missed" the Little Tucker Act or "forgot" about it. Instead, this court will follow the Supreme Court's lead and side-step the government's suggested Little Tucker Act analysis. Its existence did not save section 207 or amended section 207 from being declared unconstitutional. It will not save section 5 either. Section 5 runs afoul of the Just Compensation Clause of the Fifth Amendment. It is, therefore, unconstitutional.[6]

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[6] On the last pages of the parties' briefs, the parties wage a quiet footnote debate concerning whether, assuming that the land has been taken, it was taken for a public use. Although the issue has not been directly placed in issue, the court, on its own initiative, has pursued

B. STATUTE OF LIMITATIONS AND PLAINTIFF COLLEEN RENVILLE DUMARCE

[¶24.] As the case pertains to plaintiff Colleen Renville DuMarce only, the government argues that it is entitled to summary judgment as her claims are barred by the applicable statute of limitations. In response, Renville DuMarce argues (1) that the government, as trustee, breached fiduciary duties it owed to her, effectively tolling the statute of limitations, (2) that the unconstitutional taking continues and is, therefore, a continuing violation, and (3) that the running of the statute of limitations should be equitably tolled.

[¶25.] Before turning to the statute of limitations debate directly, the court believes it must first consider the correct statute of limitations that maybe applicable in this case. The government argues that the six-year statute of limitations contained in the Little Tucker Act controls. See 28 U.S.C. § 2401. The plaintiffs offer no alternative. Given the court's decision above regarding the applicability of the Little Tucker Act generally, the court is somewhat hesitant to use its statute of limitations in this case. Nonetheless, given the plaintiffs' acquiescence to the government's use of it, and, more importantly, the court's finding, detailed below, that the government breached its fiduciary obligations owed to Renville DuMarce, selecting the right statute of limitations is a non-issue. For purposes of this decision, therefore, the court will use the six-year cut-off contained in the Little Tucker Act.

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the issue and is satisfied that the attempt to end the on-going fractionation of undivided interests in allotted land on Indian reservations is a valid public purpose. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984) (stating that the Supreme Court "will not substitute its judgment for a legislature's judgment as to what constitutes a public use [for purposes of the Fifth Amendment] 'unless the use be palpably without reasonable foundation.' "), quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896).

[¶26.] As noted above, Renville DuMarce's father died in 1986. It was at that time that section 5 was applied to interests in the four parcels of land owned by him which caused them to escheat to the United States in trust for the tribe. Without some sort of tolling of the statute of limitations, therefore, Renville DuMarce's claims would be barred.

[¶27.] "[T]he law is 'well established that the Government in its dealings with Indian tribal property acts in a fiduciary capacity.' " *Lincoln v. Vigil*, 508 U.S. 182, 194 (1993), quoting *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987). That fiduciary duty "extends not only to Indian Tribes as governmental units, but to tribal members living collectively or individually, on or off the reservation." *Loudner v. United States*, 108 F.3d 896, 901 (8th Cir. 1997).

> The statute of limitations begins to run when a trust beneficiary knows or should know of the beneficiary's claim against the trustee. Nonetheless, because the beneficiary is entitled to rely upon the good faith and expertise of the trustee, the beneficiary's duty to discover claims against the trustee is somewhat lessened. [Citations omitted]. The beneficiary's duty to discover his or her claims against the trust is further diminished when the beneficiary has no idea that the trust even exists. One of the fundamental obligations of a trustee is the identification and notification of trust beneficiaries.

Id. at 901.

[¶28.] The issue for determination, therefore, is ascertaining when Renville DuMarce either knew or should have known of her claim against the United States. The answer to that question is hotly debated by the parties. The government contends that, because *Irving* was decided in 1987, Renville DuMarce was put on notice in 1987.[7] Renville DuMarce

[7] The government's argument that Renville DuMarce was put on notice when her father's proprietary interests escheated to the government in

counters by arguing that, because section 207 had been amended prior to the *Irving* decision, there was sufficient uncertainty surrounding the applicability of Irving to cast doubt on her awareness of a claim against the government. That doubt, Renville DuMarce contends, was not dissipated until *Youpee* was decided in 1997. In addition, Renville DuMarce argues that it is impractical for the law to require her, a non-lawyer, to periodically check the status of certain aspects of federal Indian law. Given the trust relationship, she argues, the government had the burden and obligation to make those inquiries and inform her of any developments.

[¶29.] Renville DuMarce's arguments are well-taken. It does seem odd that the government, as trustee, would advance an argument requiring the trust beneficiary, a non-lawyer, to actively investigate whether she has claims against the trustee. Such a scenario would turn the trustee relationship upside-down. In addition, the court also believes that, because of the amendment of section 207, sufficient ambiguity existed regarding its application to excuse a non-lawyer trust beneficiary from steadfastly relying upon it. Finally, the court also finds that it would be inequitable to permit the government, as trustee, to enact unconstitutional statutes that directly work to the disadvantage of the trust beneficiaries, remain silent, let time pass, and then raise that passage of time as a defense to its unconstitutional behavior. This court will not condone such behavior. A trustee, especially the United States, must do more.

[¶30.] Accordingly, Renville DuMarce will be permitted to proceed in this case. Although her claims are rather old, the court finds, as a matter of law, that the government breached a fiduciary duty owed to her by failing to inform her of her potential cause of action against the United States. Certainly, the United States knew and understood the *Irving* decision in

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1986 is without merit. Prior to *Irving* in 1987, no such escheat provision in any statute had been definitively struck down as violating the Fifth Amendment. Without *Irving*, therefore, there was no notice of any potential lawsuit against the government.

1987. The government's failure to inform those burdened by similar statutes should lie at its feet and not at the feet of the beneficiaries of the trust relationship. The government's motion for summary judgment, therefore, should be denied.

III. REMEDY

[¶31.] Given the circumstances of this case, the court is hesitant, at this time, to launch into the remedial phase of this case. As noted above, the plaintiffs request various forms of relief, beginning with an injunction ordering the government to reopen the estates of Felix Renville and Gerald Leon DuMarce and to restore title to their lands in the plaintiffs, an injunction prohibiting the Department of the Interior from escheating lands pursuant to section 5 to the United States, compensation for the loss of use of the land, and, finally, as an alternative, just compensation for the taken lands. The government, not surprisingly, does not offer any remedial solutions. Given the current posture of this case, the time that has passed since the decedents at issue in this case died, and the fact that this case will have an impact on the Sisseton-Wahpeton Indian Reservation that will go well beyond this case, the court is somewhat hesitant to order immediate relief.[8] While the court is tempted to order just compensation for the taken land, that is not the relief primarily sought by the plaintiffs. Thus, the court decides that, given the circumstances of this case, the court will refrain from ordering any relief at this time, save, of course, a declaration that section 5 is unconstitutional. The court wants to afford the government an opportunity to propose a remedy that would satisfy the plaintiffs as well as ease the potential

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[8] The court's hesitancy is underscored by a lack of information regarding the frequency with which section 5 is used. The court assumes, at this point, given the extreme fractionation of lands on the Sisseton-Wahpeton Indian Reservation, that section 5 is frequently used to escheat applicable lands to the government. Given the lack of specifics in this regard, the court will not rush into the remedial phase of this case. The court does not want to unknowingly burden the already heavily-burdened administration of the trust allotments on the reservation.

administrative burden of complying with any order of the court. Giving the government that opportunity also effectively moots the issue of whether the Sisseton-Wahpeton Sioux Tribe is an indispensable party under Fed.R.Civ.P. 19.[9] Given the absence of the relevant tribes in *Irving* and *Youpee*, the court has no doubts that the tribe is not an indispensable party, at least at this stage of the proceedings. Nonetheless, the court will proceed cautiously. Hopefully the government will chart a course that is acceptable to all. If no mutually satisfying conclusion can be arranged between the parties within sixty days of the date of this opinion, the court will revisit this issue with an eye towards appointing a special master. Hopefully, that will not be necessary.

ORDER

[¶32.] Now, therefore, in light of the foregoing,

[¶33.] IT IS ORDERED

(1) Section 5 of the Sisseton-Wahpeton Sioux Act of October 19, 1984, P.L. 98-513, 98 Stat. 2411, is unconstitutional as in violation of the Fifth Amendment.

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[9] For purposes of declaring section 5 unconstitutional, the Sisseton-Wahpeton Sioux Tribe is not an indispensable party under Fed.R.Civ.P. 19. However, any court order directing the United States to return taken lands to their lawful owners could very well require the Tribe's participation. To avoid that, the court encourages the parties to reach a resolution aimed at securing just compensation for the taken lands. From the court's perspective, that resolution would be the least burdensome to the government while also affording the plaintiffs (and those similarly situated) payment for interests in lands that are virtually inalienable because of the multitude of owners. Put another way, receiving just compensation, from the court's viewpoint, would be more preferable for the plaintiffs than having title to a fraction of an allotment restored to them that is similarly owned by dozens and possibly hundreds of others and is, for all practical purposes, incapable of being sold for fair market value.

(2) The government's motion, Doc. 38, seeking leave to file a supplemental brief, Doc. 37, is granted.

(3) The plaintiffs' motion for leave to file another response, Doc. 40, is denied as moot.

(4) The government's motion, Doc. 12, to dismiss and for summary judgment is denied.

(5) The plaintiff's motion, Doc. 23, for summary judgment is granted in part, as outlined above.

[¶34.] Dated this 14th day of May, 2003.

BY THE COURT

/s/ CHARLES B. KORNMANN
CHARLES B. KORNMANN
United States District Judge

APPENDIX D

United States District Court,
District of South Dakota
Northern Division.

Harvey DuMarce, Kenneth Dumarce, and Colleen Renville Dumarce,
Plaintiffs,
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors
in office, the Department of the Interior of the United States, and the United
States, Defendants.

No. CIV 02-1026.

ORDER

Pamela Renville, Plaintiff
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors
in office, the Department of the Interior of the United States, and the United
States, Defendants.

No. CIV 02-1040.

ORDER

Dennis L. DuMarce, Sr., Plaintiff
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors

in office, the Department of the Interior of the United States, and the United States, Defendants.

No. CIV 02-1041.

ORDER

This is a consolidated order in the cases captioned above.

The court previously granted a motion for summary judgment in each case, declaring that Section Five of Public Law 98-513, the Sisseton-Wahpeton Sioux Act of October 19, 1984, was unconstitutional. The court relied heavily on the teachings of *Hodel v. Irving*, 481 U.S. 704 (1987), and *Babbit v. Youpee*, 519 U.S. 234 (1997). The court cannot fathom why Congress has not repealed the unconstitutional statute or amended the same to attempt to come within the United States Constitution. Likewise, the court cannot fathom why the Department of Interior has continued to follow a statutory scheme that has twice been struck down by the United States Supreme Court.

The government argues that the Sisseton-Wahpeton Sioux Tribe ("Tribe") is an indispensable party, perhaps following the question raised by the court as to whether this might be true. The court now determines that it is not true. The present defendants are capable of fully protecting all interests of the Tribe and have attempted to do so throughout these actions. The government has made no effort to join the Tribe. The Tribe has not sought to intervene, despite having knowledge of the suits. Even if the Tribe could be said to be an indispensable party, the Tribe could well be protected from claims of the Native American plaintiffs in federal court by sovereign immunity. In other words, joinder would not be feasible. The court has considered the matters set forth in Fed.R.Civ.P. 19(b). Any judgment rendered in the absence of the tribe might be prejudicial to the Tribe but no more so than prejudicial to the government. Nor would the results be any different with the Tribe as a party. The Tribe would not be

ordered to do anything. The Tribe has no more right to violate the Fifth Amendment rights of the plaintiffs than does the federal government. Relief will be shaped here to only retroactively affect the probates about which the present plaintiffs complain and they seek a re-opening. These are not class actions. Thus, the prejudice to the Tribe is lessened. Any judgment rendered in the absence of the Tribe will be adequate. After all, this is a law passed by Congress and not based on anything the Tribe did. The Tribe holds no land as a result of the statute. Rather, the federal government holds the land in trust for the Tribe. I believe it is important to note also that the Tribe was allowed to file, through attorney Bertram E. Hirsch, an *amicus curiae* brief in *Hodel*. *See* footnote at 481 U.S. 706. The Tribe there was allowed to fully argue that the United States Court of Appeals for the Eighth Circuit should be reversed in its determination that an identical statutory section was unconstitutional. The present plaintiffs would not have an adequate remedy if the actions were to be dismissed for nonjoinder. In short, in equity and good conscience, these actions should proceed without the presence of the Tribe.

I reject the argument of the defendants that monetary compensation is the appropriate remedy. The plaintiffs have not sought monetary compensation or, at least at this point, have abandoned any claims for monetary compensation. Defendants seek to have the court order a "recovery" for plaintiffs that plaintiffs have not requested and do not want. This is not a Little Tucker Act case. The injuries to the real property are irremediable at law. The dismal history of the United States government in depriving Native Americans of their lands, even after having faithfully promised not to do so, is a fact that the court cannot disregard. I find that the uniqueness of land and especially this land on the reservation makes monetary damages an inadequate and inequitable remedy. This court will not fluff the pillows on the bed made by the defendants.

I also take note of the fact that the record contains a Notice from the Department of Interior of the Reopening of

the Estates in *Youpee* (affidavit of Leon Goodrich, Attach. A, Notice, Reopening Certain Escheated Estates, Department of the Interior, February 26, *1999 Federal Register, Vol. 64, No.* 38, pp. 9520-21) (Doc. 50 in CIV 02-1026). With the defendants having supported the reopening of estates after the *Youpee* decision, the government's argument that it is inappropriate here has no merit. The government has taken contradictory positions.

The remaining issues now before the court are not novel or complicated. An extended opinion would add little to what this court has already said and what this court believes is clearly the law. All other defenses and claims of the defendants are rejected. Plaintiffs have standing; the claims are ripe; the court has jurisdiction over the parties and the subject matter. A final judgment should be entered in each case in favor of the plaintiffs.

Now, therefore,

IT IS ORDERED, as follows:

1) The defendants are permanently enjoined and restrained from any further use of Section 5 of Public Law 98-513.

2) The defendants shall forthwith reopen the estates of Gerald Leon DuMarce, deceased, and Felix Renville, Sr., deceased, proceeding through the probate procedures as though Section 5 of Public Law 98-513 did not and does not exist.

Date this 21st day of October, 2003

BY THE COURT

/s/ CHARLES B. KORNMANN
CHARLES B. KORNMANN
United States District Judge

APPENDIX E

United States District Court,
District of South Dakota
Northern Division.

Harvey DuMarce, Kenneth Dumarce, and Colleen Renville Dumarce,
Plaintiffs,
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors
in office, the Department of the Interior of the United States, and the United
States, Defendants.

No. CIV 02-1026.

JUDGMENT OF DISMISSAL

The Court having entered its Order on October 22, 2003, it is hereby

ORDERED that the Defendants are permanently enjoined and restrained from any further use of Section 5 of Public Law 98-513. It is further ORDERED that the Defendants shall forthwith reopen the estates of Gerald Leon DuMarce, deceased, and Felix Renville, Sr., deceased, proceeding through the probate procedures as though Section 5 of Public Law 98-513 did not and does not exist, and the action be dismissed with prejudice and without costs.

Dated this 30th Day of October, 2003

JOSEPH HASS, Clerk

APPENDIX F

United States District Court,
District of South Dakota
Northern Division.

Harvey DuMarce, Kenneth Dumarce, and Colleen Renville Dumarce,
Plaintiffs,
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors
in office, the Department of the Interior of the United States, and the United
States, Defendants.

No. CIV 02-1026.

ORDER

Pamela Renville, Plaintiff
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors
in office, the Department of the Interior of the United States, and the United
States, Defendants.

No. CIV 02-1040.

ORDER

Dennis L. DuMarce, Sr., Plaintiff
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors

in office, the Department of the Interior of the United States, and the United States, Defendants.

No. CIV 02-1041.

ORDER

The Clerk's Judgment having erroneously been entered,

IT IS ORDERED that the Judgment of Dismissal filed October 30, 2003 is hereby in all respects VACATED.

Dated this 3rd day of November, 2003.

BY THE COURT

/s/ CHARLES B. KORNMANN
CHARLES B. KORNMANN
United States District Judge

APPENDIX G

United States District Court,
District of South Dakota
Northern Division.

Harvey DuMarce, Kenneth Dumarce, and Colleen Renville Dumarce,
Plaintiffs,
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors
in office, the Department of the Interior of the United States, and the United
States, Defendants.

No. CIV 02-1026.

ORDER

Pamela Renville, Plaintiff
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors
in office, the Department of the Interior of the United States, and the United
States, Defendants.

No. CIV 02-1040.

ORDER

Dennis L. DuMarce, Sr., Plaintiff
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors

in office, the Department of the Interior of the United States, and the United
States, Defendants.

No. CIV 02-1041.

ORDER

This is a consolidated order in the cases captioned above.

The Court on October 21, 2003, signed a consolidated order in each of these cases, finding in favor of plaintiffs on all issues. For example, this was Doc. 28 in CIV 02-1040. Some confusion was perhaps inherent in the wording of the order. It provided in the body of the order that a "final judgment should be entered in each case in favor of the plaintiffs." In the "order portion", the defendants were permanently enjoined and restrained from any further use of Section 5 of Public Law 98-513. In addition, the defendants were ordered to forthwith reopen the estates of Gerald Leon DuMarce, deceased, and Felix Renville, Sr., deceased, proceeding through the probate procedures as though Section 5 of Public Law 98-513 did not and does not exist.

The clerk's office then drafted and entered what was called a judgment of dismissal (e.g. Doc. 63 in CIV. 02-1026), dismissing the action with prejudice and without costs. I had never directed any dismissal, especially without costs. I explained the confusion in a memorandum to counsel in all three cases (e.g. Doc. 30 in CIV 02-1040). On November 3, 2003, I signed an Order (e.g. Doc. 31 in CIV. 02-1040) to set aside what the clerk had done.

Plaintiffs then served and filed in all three cases applications for attorney fees and costs. Defendant in each case objected, stating also that no final judgment had yet been entered and thus the applications were premature. I agree with the contentions of the defendant. No final judgment has yet been entered. Nor has the time for appeal passed.

I do not know whether or not defendant has complied with the Order of the court, including the permanent injunction. Defendant should be required to file a report by a given date, setting forth what has been done and what has not been done. A final judgment should then be entered so that defendant may determine whether or not to appeal. Although the application for attorney fees and costs is premature, I will not require the plaintiffs to re-file all such documents when and if the judgment becomes final.

Now, therefore,

IT IS ORDERED that the defendant in each of these cases shall prepare, serve, and file by no later than July 1, 2004, a report as to what action, if any, has been taken by the defendant in response to and in compliance with the Order of the court (e.g. Doc. 28 in CIV. 02-1040) in each of these cases.

Dated this 10th of June, 2004.

BY THE COURT

/s/ CHARLES B. KORNMANN
CHARLES B. KORNMANN
United States District Judge

APPENDIX H

United States District Court,
District of South Dakota
Northern Division.

Harvey DuMarce, Kenneth Dumarce, and Colleen Renville Dumarce,
Plaintiffs,
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors
in office, the Department of the Interior of the United States, and the United
States, Defendants.

No. CIV 02-1026.

ORDER

Pamela Renville, Plaintiff
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors
in office, the Department of the Interior of the United States, and the United
States, Defendants.

No. CIV 02-1040.

ORDER

Dennis L. DuMarce, Sr., Plaintiff
v.
Gale A. Norton, Secretary of the Interior, her agents, assigns, and successors

in office, the Department of the Interior of the United States, and the United States, Defendants.

No. CIV 02-1041.

ORDER

(filed August 4, 2004)

This is a consolidated order in the cases captioned above.

The court previously entered a memorandum opinion and order (Doc. 43), granting a motion for summary judgment in each case and declaring that Section Five of Public Law 98-513, the Sisseton-Wahpeton Sioux Act of October 19, 1984, was unconstitutional. The court relied heavily on the teachings of *Hodel v. Irving*, 481 U.S. 704 (1987), and *Babbit v. Youpee*, 519 U.S. 234 (1997). The court cannot fathom why Congress has not repealed the unconstitutional statute or amended the same to attempt to come within the United States Constitution. Likewise, the court cannot fathom why the Department of Interior has continued to follow a statutory scheme that has twice been struck down by the United States Supreme Court.

The court also previously entered an Order (Doc. 62) consisting of, *inter alia*, a permanent injunction as to any attempted enforcement of Section 5 of Public Law 98-513 by the defendants and an order that the defendants "forthwith" reopen the estates of Gerald Leon DuMarce, deceased, and Felix Renville, Sr., deceased, proceeding through the probate process as though Section 5 of Public Law 98-513 did not exist.

The court entered an Order (Doc. 72) providing for a status report and setting forth what had previously occurred. The parties have each filed a status report.

These cases should now be consolidated into one file, such file being DuMarce, et al. v. Norton, et al., CIV 02-1026.

The applications for legal fees and costs as filed by the plaintiffs are premature since no final judgment yet exists. Such applications should be denied without prejudice. If, at the conclusion of this case (when all appeals have failed or the time has expired), the plaintiffs are the prevailing parties and desire to re-submit such applications, they should be permitted to do so by simply filing a notice asking for the awards, incorporating by reference what they have already filed.

Now, therefore,

IT IS ORDERED, as follows:

1) The applications for legal fees and costs are denied without prejudice. If, at the conclusion of the case, when all appeals have failed or the time has expired so that plaintiffs are the prevailing parties and desire to re-submit such applications, they may do so by simply filing a notice asking for the awards, incorporating by reference what they have already filed.

2) These cases are consolidated and all filings shall be contained in DuMarce, et al. v. Norton, et al., CIV 02-1026.

3) Defendants shall now proceed without further delay to comply with the previous Orders of this court.

4) This is a final judgment, incorporating by reference all provisions of Docs. 43 and 62.

BY THE COURT:

/s/CHARLES B. KORNMANN
CHARLES B. KORNMANN
United States District Judge